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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

UNITED SERVICES AUTOMOBILE	(	CAUSE NO. 2:20-CV-319-JRG
	)	(Lead)
ASSOCIATION,	(	CAUSE NO. 2:21-CV-110-JRG
	)	
Plaintiff,	(	
	)	
vs.	(	
	)	
PNC BANK, N.A.,	(	MAY 13, 2022
	)	MARSHALL, TEXAS
Defendant.	(	8:00 A.M.

VOLUME 5

TRIAL ON THE MERITS

BEFORE THE HONORABLE RODNEY GILSTRAP  
UNITED STATES CHIEF DISTRICT JUDGE

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1           THE COURT: Counsel, before we move on to other  
2 matters, I want to take up with you the motions that have been  
3 filed overnight, and I'm going to do this on the record. I  
4 want to take up first the motion filed by Wells Fargo for a  
5 protective order.

6           Have you-all discussed this and do you have any areas of  
7 agreement with regard to this motion or all matters raised in  
8 the motion in dispute between the parties?

9           MR. SHEASBY: I did speak with Ms. Smith yesterday,  
10 and I can report Ms. Smith and I did reach agreement, which is  
11 to say, in the closing there will be no reference to the Wells  
12 Fargo number and the number will be redacted from the slides.  
13 So there will be no conceivable way for anyone to see the  
14 number.

15           THE COURT: So you're telling me there may be a  
16 reference to the negotiated license itself, but the  
17 particulars of the negotiated license won't be mentioned.

18           MR. SHEASBY: That's correct, Your Honor.

19           THE COURT: Well, the motion asks for the courtroom  
20 to be sealed prior to any use of or reference to terms of the  
21 settlement agreement. I would assume that would allow a  
22 reference to the fact that a license agreement was negotiated  
23 and settled upon without referring to the actual terms of it.

24           MR. SHEASBY: That's correct. That's our intention  
25 to comply with the area of request.

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(Redacted.)

1 or to the extent it's been done and something has slipped  
2 through the cracks, I'm going to order the pretrial and the  
3 trial transcripts be redacted as to any specific terms from  
4 the license agreement.

5 Her motion keeps referring to this as a settlement and  
6 you-all have used the word 'settlement' at various times and,  
7 in fact, the word 'settlement' is included on some of the  
8 disputed demonstratives for closing. I am not comfortable  
9 with using the word 'settlement'. Settlement to me implies  
10 settle a dispute or settling a lawsuit. It doesn't imply  
11 finalizing a negotiation of a license.

12 So I think we all need to be careful to avoid the word  
13 'settlement' and talk about a negotiated license. And I'm  
14 going to instruct you to avoid the use of the word  
15 'settlement' when referring to the Wells Fargo license in your  
16 closings.

17 All right. The third thing they ask for is that Wells  
18 Fargo be permitted to redact information from the final  
19 hearing and trial transcripts, and I'm not about to let any  
20 third party come in and take over the Court's transcripts and  
21 decide unilaterally what to redact and what not to redact.  
22 And I'm going to deny that.

23 And the fourth item they ask for is any filings with the  
24 Court referring to the terms of the settlement also be filed  
25 under seal. The only problem with this is I can't sit here

1 and instruct the clerk these 15 filings refer to the license  
2 agreement, therefore they need to be under seal and these 27  
3 don't.

4 I think both sides in this case need to meet and confer  
5 and agree upon a list of filings with the Court that fall  
6 within this fourth category. And upon presentment of an  
7 agreed list of filings that fall within this category, then I  
8 can direct the clerk to place those under seal.

9 MR. SHEASBY: And, Your Honor, that should have  
10 already been done.

11 THE COURT: And it may have already been done, but  
12 to the extent it hasn't, I want both sides to review the  
13 filings in this case and make sure there's not something  
14 that's inadvertently not been sealed heretofore that needs to  
15 be.

16 MR. SHEASBY: I understand.

17 THE COURT: Now, I'll also note for the record that  
18 Wells Fargo didn't send a representative or counsel to  
19 participate in this process and merely filed this order in the  
20 case from their counsel in North Carolina, and there's nobody  
21 here nor have they asked to conduct a telephonic or remote  
22 hearing, they haven't asked to participate in this process at  
23 all. And they're well aware of the timing of the trial and  
24 the fact that this matter is going to the jury today.

25 So I see no basis that Wells Fargo can complain or should

1 be able to complain about anything less than they've asked for  
2 here, given that they simply dropped this in the middle of  
3 this case and have done nothing more, made no effort to argue  
4 or to do anything participatory regarding this motion.

5 So my intention and my order in this regard is that the  
6 parties may not specifically refer to the precise terms of the  
7 USAA/Wells Fargo patent license agreement during the remainder  
8 of the trial.

9 I will permit, as Mr. Lantier for PNC requested,  
10 references to argument containing statements, You've heard  
11 evidence about the number of patents, you've heard evidence  
12 about the time period that this license agreement would cover.  
13 Those two areas I think are fine if they're done generically  
14 and are referring back to prior testimony without then  
15 drilling down as to the specific number of patents or the  
16 specific time period.

17 MR. LANTIER: Your Honor --

18 THE COURT: Yes, sir.

19 MR. LANTIER: I'm sorry, Your Honor. I did not mean  
20 to interrupt you. I suggested earlier you said it could be a  
21 significant number of patents.

22 THE COURT: I don't recall saying 'significant'. I  
23 said you can refer to a number of patents.

24 I'm going to grant the second area of relief and order  
25 the pretrial and trial transcripts sealed as to any portions



1       thereof that refer to the specific terms of the patent license  
2       agreement between USAA and Wells Fargo and then that sealing  
3       take place before any public release of those transcripts.

4             I'm going to deny Wells Fargo's third request to  
5       unilaterally itself determine what should be redacted from the  
6       transcripts.

7             I'm going to grant the fourth area of relief, and in so  
8       doing, I'm going to direct PNC and USAA through their counsel  
9       to meet and confer and present the Court with an agreed list  
10      of the filings in this case that should under the motion for  
11      protective order be sealed by the clerk, after which I'll then  
12      direct the clerk to be sure that those filings are under seal.  
13      And you-all should do that within 72 hours of a return of a  
14      verdict in this case.

15            That's the Court's ruling on the Wells Fargo motion for  
16      protective order.

17            Now, we have a lot of ground to cover since I've been  
18      presented with quite a few disputes regarding demonstratives  
19      to be used in closing. We still have to conduct a formal  
20      charge conference, so I'm going to go through the remaining  
21      motions quickly.

22            I've reviewed these carefully. I've looked at the  
23      briefing on both sides. These are three motions that were  
24      filed last night. I'm not going to ask for argument on them  
25      because I'm persuaded I don't need argument on them. They all

1 deal with matters that took place during the trial over which  
2 the Court presided and is intimately familiar.

3 So with regard to PNC's motion for curative jury  
4 instruction, Document 703, that motion is denied.

5 PNC never raised an objection at the time this occurred  
6 during the trial, and the requested instruction far exceeds  
7 any level of prejudice that might have occurred, in my view.  
8 So that motion is denied.

9 The Defendant PNC'S motion to preclude USAA from  
10 asserting or implying copying during closing argument, I have  
11 searched my memory and I have queried my staff and I don't  
12 think anybody recalls the word 'copying' being used during the  
13 trial. There are certainly testimony about things that could  
14 be characterized as copying, and copying, to the extent it  
15 exists, is a relevant consideration with regard to the issue  
16 of willfulness.

17 Does the Plaintiff intend to use the word 'copying' per  
18 se in its closing argument?

19 MR. SHEASBY: No.

20 THE COURT: All right. With that understanding, I'm  
21 going to deny the Defendant's motion: Certainly the plaintiff  
22 can argue whatever it wants to about the evidence that's  
23 presented and characterize it as it believes best serves its  
24 purposes as can the Defendant and as is to be expected in any  
25 closing argument.

1 All right. With regard to the Plaintiff's requested  
2 motion to preclude the Defendants from arguing that no mobile  
3 device is required to infringe the '571 Patent or claim 30 of  
4 the '681 Patent as document 699, that motion is denied.

5 Both sides can argue this point, both sides have  
6 presented evidence on this point, the Court is going to  
7 instruct the jury on what is appropriate for infringement and  
8 what the standards are they are to apply in reaching their  
9 decision on that issue.

10 And I think the Court's instructions and -- I think the  
11 Court's instructions are appropriate, and I'm not going  
12 to -- this is effectively a motion to ask the Court to  
13 intervene and to circumscribe what can be argued or presented  
14 at closing, and I'm not going to do that. This motion is  
15 denied.

16 All right. I'm prepared to turn to the overnight  
17 disputes.

18 THE COURT: Be seated, please.

19 Counsel, the Court now intends to conduct a formal charge  
20 conference in the USAA/PNC case.

21 Previously, the parties submitted proposed final jury  
22 instructions and a proposed verdict form. Prior to the trial,  
23 during the course of the trial, and in light of the evidence  
24 presented, the Court felt that an updated and renewed  
25 submission jointly from the parties would be helpful, and I

1 ordered the parties to jointly meet and confer and submit an  
2 updated and revised joint proposal concerning the final jury  
3 instructions and verdict form.

4 That was received shortly after 3:00 on Wednesday. That  
5 document, at least as to the proposed charge, 73 pages in  
6 length, set forth numerous areas of disagreement. The Court  
7 reviewed that submission as well as the parties' updated  
8 submission concerning the verdict.

9 The Court carefully considered the commentary included in  
10 the submissions by way of footnotes, cases cited, authorities  
11 relied upon. The Court carefully considered the proposed  
12 instructions from both Plaintiff and Defendant.

13 In many cases, the Court adopted a different construction  
14 than either party submitted or a modified version of what  
15 either party submitted. In some cases, the Court adopted a  
16 proposal from one party or the other. But, in essence, the  
17 Court has arrived at what it believes to be a fair and  
18 balanced and appropriate set of final jury instructions and a  
19 verdict form for use in this trial.

20 That version of the verdict form and verdict -- excuse  
21 me, that version of the final jury instructions and verdict  
22 were delivered to the parties electronically this morning at  
23 7:00. It is now 8:44. The Court is satisfied that both sides  
24 have had an ample opportunity to review these documents as  
25 generated by the Court in light of their earlier submissions,

1 and the Court will now conduct a formal charge conference on  
2 the record where either party may lodge what objections it  
3 believes are appropriate and necessary to protect the  
4 interests of their respective clients.

5 Counsel, my practice in this regard has uniformly been to  
6 have a single spokesman for each party go to the podium and  
7 stand there together, and I will review these two documents,  
8 beginning with the final jury instruction and followed by the  
9 verdict form, on a page-by-page basis so that we do not  
10 overlook or miss anything.

11 And at any point along that way when I get to a page, if  
12 you believe that something has been included that is improper  
13 or you believe something omitted which was necessary, then you  
14 are free to make any objections on the record that you feel  
15 are appropriate. But by beginning at the first page and  
16 walking through page by page the entirety of each document,  
17 the Court is satisfied that it has the best chance of  
18 being -- has the best chance of avoiding any unintended  
19 omissions or missing anything that is important to be raised  
20 by either party.

21 So with that, whoever is going to speak for Plaintiff and  
22 whoever is going to speak for Defendant, please go to the  
23 podium, and we'll begin the process with the final jury  
24 instructions.

25 We'll begin with the cover page, or page 1, of the final

1 jury instructions, and I'll ask if there is objection from  
2 either the Plaintiff or the Defendant as to anything on page 1  
3 of these final jury instructions.

4 MS. GLASSER: No, Your Honor, not from Plaintiff.

5 MR. DANFORD: Good morning, Your Honor. Andrew  
6 Danford for PNC. No objection to page 1.

7 THE COURT: All right. Turning then to page 2, is  
8 there objection here from either party?

9 MS. GLASSER: No objection.

10 MR. DANFORD: No objection, Your Honor.

11 THE COURT: Turning then to page 3, is there any  
12 objection from either party?

13 MS. GLASSER: No objection.

14 MR. DANFORD: No objection.

15 THE COURT: Turning next to page 4 of the final jury  
16 instructions, is there any objection?

17 MS. GLASSER: No objection.

18 MR. DANFORD: No objection.

19 THE COURT: Turning then to page 5, is there any  
20 objection?

21 MS. GLASSER: No objection.

22 MR. DANFORD: No objection.

23 THE COURT: Turning next to page 6 of the final jury  
24 instructions, is there objection from either party?

25 MS. GLASSER: No objection.

1 MR. DANFORD: No objection.

2 THE COURT: Turning next to page 7, is there any  
3 objection here from either party?

4 MS. GLASSER: No objection.

5 MR. DANFORD: Your Honor, PNC objects to the  
6 language on page 7, each claim is effectively treated as if it  
7 were a separate patent. The reason we object here is there  
8 has been discussion at this trial about a large number of  
9 patents, hundreds of patents, from USAA. There only are four  
10 patents at issue, and we think that in the context of the way  
11 that the arguments have been presented at this trial, it would  
12 be confusing to add that language here.

13 THE COURT: Thank you, counsel. That objection is  
14 overruled. Is there anything further on page 7?

15 MR. DANFORD: Nothing further.

16 THE COURT: Turning then to page 8, is there any  
17 objection here from either party?

18 MS. GLASSER: No objection.

19 MR. DANFORD: No objection.

20 THE COURT: Turning then to page 9, is there any  
21 objection from either party?

22 MS. GLASSER: No objection.

23 MR. DANFORD: No objection.

24 THE COURT: Turning next to page 10, is there any  
25 objection?

1 MS. GLASSER: No objection.

2 MR. DANFORD: No objection.

3 THE COURT: Turning next to page 11, is there  
4 objection here?

5 MS. GLASSER: No objection.

6 MR. DANFORD: Your Honor, PNC has an objection here,  
7 and we object to the statement that "a device infringes if it  
8 is reasonably capable of satisfying the claim elements.'

9 And we believe, based on the evidence and arguments that  
10 have been presented in the case, the jury should be instructed  
11 as follows: "The '571 Patent recites claims directed to  
12 computer-readable instructions that, when executed by a  
13 processor, cause the processor to perform certain actions.  
14 Those claims are infringed only if the accused product is  
15 designed in such a way as to enable the user to perform the  
16 claimed actions without having to modify the product software  
17 code. If the code would need to be modified to perform the  
18 actions listed in the '571 Patent claims, then the claims are  
19 not infringed."

20 And we believe that those -- that instruction is  
21 supported by the law cited in the footnotes, in particular the  
22 *Nazomi* case, *Typhoon Touch*, *Finjan*, *Fantasy Sports*, and  
23 *Telemac*.

24 THE COURT: Thank you, counsel. That objection is  
25 overruled. Is there anything further on page 11.



1 MR. DANFORD: For the same reasons, we object to the  
2 statement that a device infringes if it is reasonably capable  
3 of satisfying the claim elements without explaining that a  
4 device whose source code would need to be modified in order to  
5 infringe is not reasonably capable of infringing.

6 THE COURT: Likewise, that objection is overruled.  
7 Anything further on page 11?

8 MR. DANFORD: Nothing further on page 11.

9 THE COURT: Let's turn then to page 12 of the final  
10 jury instructions. Is there objection here from either  
11 Plaintiff or Defendant?

12 MS. GLASSER: Your Honor, USAA has an objection to  
13 the portion discussing the direction and control test.  
14 Specifically, given the way that the evidence went in in this  
15 case and the Federal Circuit case law, USAA believes that the  
16 jury should be instructed that the accused infringer does not  
17 have to have made each component as long as it combines the  
18 components and as well that there's no requirement of having  
19 physical control.

20 THE COURT: All right. That objection is overruled.  
21 Is there anything from Defendant regarding page 12?

22 MR. DANFORD: Yes, Your Honor.

23 PNC objects to the Court's instruction to the extent that  
24 it does not provide an adequate definition of direction and  
25 control. And we believe that the Court should instruct the

1 jury as follows to give that guidance: "To prove that PNC  
2 directed or controlled the acts of a third party, USAA must  
3 prove either that, one, a third party is the agent of PNC or  
4 is contractually obligated to PNC to carry out the claim  
5 steps; or, two, the third party performed the claim steps in  
6 order to receive a benefit from PNC and that PNC established  
7 how or when the claim steps were performed."

8 And we think without that detail, the jury's left without  
9 guidance as to what the meaning of direction or control is.

10 THE COURT: Thank you, counsel. That objection is  
11 overruled. Anything from either party remaining on page 12?

12 MR. DANFORD: Your Honor, this is an issue that  
13 spans from page 12 to page 13, and it's with respect to the  
14 doctrine of equivalents. I'm happy to address it now. It's  
15 going to run over the page, but we object to the phrase, "An  
16 accused product is equivalent to element or limitation," on  
17 line 2 of page 13, the instruction begins on the prior page.  
18 "The doctrine of equivalents does not compare a product to an  
19 element or limitation as the language might suggest to the  
20 jury that infringement can be found if the product satisfies  
21 only one claim limitation."

22 And we request request that the Court should instruct as  
23 follows: "Under the doctrine of equivalents, a product  
24 infringes a claim if the accused product contains elements  
25 that are literally met or are equivalent to every element of

1 the claim."

2 THE COURT: All right. Thank you, counsel. That  
3 objection is overruled.

4 Before we formally turn to page 13, I'll ask again, is  
5 there anything from either party that you care to raise that  
6 has not already been raised reflected on page 12 of the  
7 instructions?

8 MS. GLASSER: No, Your Honor.

9 MR. DANFORD: Nothing further from PNC.

10 THE COURT: Okay. Then let's turn to page 13. And  
11 in addition to what's already been raised, are there any other  
12 objections on page 13?

13 MS. GLASSER: No objection.

14 MR. DANFORD: Yes, Your Honor.

15 PNC has an objection to the willfulness instruction on  
16 page 13, and we specifically object to the paragraph that is  
17 the last full paragraph on the page: "You may find that PNC's  
18 actions were willful if PNC acted in reckless or callous  
19 disregard of or with indifference to the rights of USAA. A  
20 Defendant who is indifferent to the rights of another when it  
21 perceives and disregards a high or excessive danger of  
22 infringement it is known to or was apparent to a reasonable  
23 person's position."

24 We believe that that instruction misstates the law of  
25 willfulness and that it omits the specific intent requirement

1 of deliberate or intentional conduct, which is reflected in  
2 the prior paragraph.

3 THE COURT: All right. That objection is overruled.  
4 Is there anything else on page 13?

5 MR. DANFORD: Not on page 13, Your Honor.

6 THE COURT: Anything from Plaintiff on page 13?

7 MS. GLASSER: No, Your Honor.

8 THE COURT: Let's turn to page 14. Are there  
9 objections here from either party?

10 MS. GLASSER: No objection.

11 MR. DANFORD: Yes, Your Honor.

12 With respect to the issue of willfulness, this is that  
13 instruction that carries over from page 13, at the end of that  
14 paragraph at the top of page 13, there is an instruction on  
15 willful blindness, but the jury has not been provided with any  
16 direction as to what the standard for willful blindness is.

17 And so if there is going to be an instruction of willful  
18 blindness, we believe that the jury should be instructed that  
19 willful blindness requires taking active steps to avoid  
20 knowing a fact. And that's based on the willful blindness  
21 standard as set forth in the Supreme Court's Global Tech  
22 decision.

23 THE COURT: All right. That objection is overruled.  
24 Is there anything else on page 14?

25 MS. GLASSER: Not from Plaintiff, Your Honor.

1 MR. DANFORD: With respect to the issue of written  
2 description, which is an issue on page 13 and 14, Your Honor,  
3 we object to the exclusion of -- from our proposal that there  
4 is no presumption that the Patent Office considered whether a  
5 patent application satisfies the written description  
6 requirement. Rather, whether the Patent Office considered any  
7 particular issue can only be determined by reviewing the  
8 patent's prosecution history.

9 The question is not whether a claimed invention is an  
10 obvious variant of that which is disclosed in the  
11 specification. The specification must describe the claimed  
12 invention in a way that a person of ordinary skill in the art  
13 would understand that the larger category being claimed has  
14 been invented, not just a single example. The inventor's  
15 possession of the invention outside the specification is not  
16 sufficient to satisfy the written description requirement.  
17 Rather, the specification itself must demonstrate that the  
18 inventor possessed the full scope of the claimed invention  
19 such that one skilled in the art reading the original  
20 disclosure could reasonably discern that the inventor  
21 possessed the full scope of the claimed invention at the time  
22 the patent application was filed

23 THE COURT: All right. That objection is overruled,  
24 although I will note that the written description instructions  
25 are not fully contained on page 14. They are on the following

1 pages. But we will get there.

2 Again, for purposes of being careful and for  
3 completeness, does either party have any other objections to  
4 any other matter either included on or omitted from page 14?

5 MS. GLASSER: No, Your Honor.

6 MR. DANFORD: No, Your Honor.

7 THE COURT: In addition to what's already been  
8 heard, does any party have an objection to anything either  
9 included within or excluded from page 15?

10 MS. GLASSER: Your Honor, USAA objects to the  
11 omission of any instruction making clear to the jury that it's  
12 not necessary for the specification to describe concepts that  
13 are already well known in the art. In view of the way PNC put  
14 on its case, USAA believes that that omission is prejudicial.

15 THE COURT: That objection is overruled. Is there  
16 any other objection from either party on page 15?

17 MR. DANFORD: No, Your Honor. I'll just clarify for  
18 the record that I misspoke earlier in that written description  
19 began on 14 and then went to 15.

20 THE COURT: That's not the problem. I want to be as  
21 clear as you do. All right. Then let's turn to page 16 of  
22 the final jury instructions. Are there any objections here  
23 from either party?

24 MS. GLASSER: Yes, Your Honor. USAA objects to the  
25 omission of instruction to the jury that commercial success

1 optimization or other steps relating to commercialization of a  
2 product are not part of the enablement requirement.

3 In particular, USAA believes that, in view of the  
4 evidence put on by PNC, it was extremely important to include  
5 language such as set forth by the Federal Circuit in the *Engel*  
6 case or the *CMFT* case, making clear to the jury that it is  
7 inappropriate to approach the enablement inquiry from the  
8 perspective of optimization or commercialization.

9 THE COURT: All right. That objection is overruled.  
10 Anything further from either party on page 16?

11 MR. DANFORD: Yes, Your Honor.

12 PNC objects to the omission of certain instructions that  
13 PNC proposed on enablement, and in particular we object to the  
14 omission of the following instruction: "The amount of  
15 experimentation is undue where there is evidence of the  
16 patentee's own failures to make and use the later claimed  
17 invention at the time of the application. The amount of  
18 experimentation necessary for the patentee to develop a  
19 working embodiment of the claimed invention is relevant to  
20 whether undue experimentation is required to make and use the  
21 claimed invention. A patent is not enabled where it discloses  
22 only a starting point or a direction for further research or  
23 it at the time of filing acknowledged necessary claimed  
24 invention did not exist."

25 We believe that those instructions are particularly

1 relevant given the evidence that was presented in this case.

2 THE COURT: Thank you, counsel. That objection's  
3 overruled.

4 Anything else from either party on page 16?

5 MS. GLASSER: No, Your Honor.

6 MR. DANFORD: Nothing further.

7 THE COURT: Turning then to page 17, are there  
8 objections here from either party?

9 MS. GLASSER: No, Your Honor, not from USAA.

10 MR. DANFORD: No objection from PNC.

11 THE COURT: Turning then to page 18, are there  
12 objections here from either party?

13 MS. GLASSER: No objections.

14 MR. DANFORD: No objection, Your Honor.

15 THE COURT: Turning then to page 19, is there  
16 objection here from either party?

17 MS. GLASSER: No, Your Honor.

18 MR. DANFORD: Your Honor, PNC has two objections to  
19 the damages instruction on page 19, and we object to the  
20 omission of instructions on two issues.

21 The first issue is we believe the jury should have an  
22 instruction on the entire market value rule. And, in  
23 particular, we believe that the jury should be instructed, "In  
24 order to recover damages as a portion of revenues or profits  
25 attributable to these other products, USAA must establish that



1 it is more likely than not that the patented feature is the  
2 sole driver of customer demand for these other products such  
3 that it creates the basis for customer demand or substantially  
4 creates the value of those products."

5 Separately, we would request an instruction on convoyed  
6 sales and, in particular, "To recover royalties for convoyed  
7 sales of any collateral products, USAA must prove that the  
8 collateral products are so closely related to mobile check  
9 deposit that they effectively act or are used together for a  
10 common purpose. In other words, mobile deposit and the  
11 collateral product must together constitute a functional unit.  
12 USAA may only add the value of collateral products into its  
13 royalty base if that connection exists."

14 And, Your Honor, we believe both of those instructions  
15 are required, given the way that USAA presented its damages  
16 evidence in this case.

17 THE COURT: All right. That objection is overruled.  
18 Is there anything further from either party on page 19?

19 MR. DANFORD: Nothing further.

20 MS. GLASSER: Not from Plaintiff, Your Honor.

21 THE COURT: Turning then to page 20, is there any  
22 objection here from either party?

23 MS. GLASSER: No, Your Honor.

24 MR. DANFORD: No objection to page 20, your Honor.

25 THE COURT: I'll note for the record, counsel, that

1 pages 19 and 20 contain recital of all 15 of the  
2 *Georgia-Pacific* factors. Given your failure to object, I  
3 assume both sides do not object to the Court charging the jury  
4 on all 15 of the factors.

5 MS. GLASSER: Yes, Your Honor.

6 MR. DANFORD: No objection from PNC.

7 THE COURT: Okay. Then let's turn to page 21. Is  
8 there objection here from either party?

9 MS. GLASSER: Your Honor, USAA objects to the  
10 statement that USAA has the burden, the responsibility, to  
11 show that there were no acceptable non-infringing substitutes.  
12 That suggests that USAA had an affirmative burden to  
13 demonstrate the absence of substitutes which is not a correct  
14 statement of the law for a reasonable royalty case. And so  
15 USAA believes that that statement should be deleted.

16 And, additionally, USAA objects to the admission [sic] of  
17 an instruction indicating that PNC bears the burden of showing  
18 that its proposed alternative was available.

19 THE COURT: That objection is overruled. Anything  
20 else on page 21 from either party?

21 MS. GLASSER: Yes, Your Honor. So at the very  
22 bottom of the page, the instruction states, "If you find USAA  
23 or its licensees failed to properly mark their respective  
24 products," and it goes on, and then it says, "You may only  
25 award damages to USAA for infringement that occurred after the

1 date USAA gave actual notice." And we believe that it should  
2 say, USAA began marking or gave actual notice, because the  
3 notice statute is clear that you can commence the damages  
4 period either by constructive or by actual notice.

5 THE COURT: That objection is overruled in light of  
6 the evidence presented in this case.

7 Anything else from either party on page 21?

8 MR. DANFORD: Yes, Your Honor. PNC objects to the  
9 phrase 'acceptable non-infringing substitutes or alternatives  
10 to the patented invention,' and in particular we're objecting  
11 to the word 'acceptable' in this context. We believe it's  
12 error to require that an alternative be acceptable for a  
13 reasonable royalty analysis where there's case law that states  
14 that courts consider the next best available alternative which  
15 is not necessarily an acceptable alternative. And that's from  
16 the *Salazar versus HTC* case that was cited in the parties'  
17 briefing to the Court.

18 We further object to the sentence, "a substitute or  
19 alternative that infringes other patents held by the Plaintiff  
20 cannot be used by the Defendant as a non-infringing substitute  
21 or alternative." We believe that the case law on reasonable  
22 royalties establishes that damages for other patents should be  
23 determined in another suit involving the patents, and the only  
24 issue in this case is the value of the particular four patents  
25 asserted in this litigation, and the infringement of

1 unasserted claims or unasserted patents is irrelevant to the  
2 determination of a royalty for the four patents-in-suit.

3 THE COURT: All right.

4 MR. DANFORD: We have a further objection on the  
5 marking.

6 THE COURT: Let me let you go ahead and finish that.

7 MR. DANFORD: We believe on page 21 that the Court  
8 should add the following sentence: "This type of notice  
9 starts from the date USAA began to mark substantially all  
10 products that used the invention with the numbers affixed of  
11 the asserted patents."

12 And, currently, the jury's told that marking was all or  
13 nothing, but it's disputed as to whether the product was first  
14 marked or as to when the product was first marked, and the  
15 jury should know that it should not award damages from any  
16 earlier point than was actually marked.

17 THE COURT: Does PNC have any other objections to  
18 anything reflected on page 21 of the final jury instructions?

19 MR. DANFORD: No other objections.

20 THE COURT: The objections enumerated by PNC  
21 regarding page 21 are overruled.

22 We'll turn then to page 22. Are there any objections  
23 here from either party?

24 MS. GLASSER: No, Your Honor.

25 MR. DANFORD: No objection, Your Honor.

1 THE COURT: Turning then to page 23, are there  
2 objections here from either party?

3 MS. GLASSER: No, Your Honor.

4 MR. DANFORD: No, Your Honor.

5 THE COURT: Turning then to page 24, which is the  
6 last page of the final jury instructions, is there objection  
7 here from either party?

8 MS. GLASSER: No, Your Honor.

9 MR. DANFORD: No, Your Honor.

10 THE COURT: All right. Let's next turn to the  
11 verdict form. We'll follow the same procedure. Beginning on  
12 the cover page, or page 1, of the verdict form, is there  
13 objection here from either party?

14 MS. GLASSER: I apologize, Your Honor. I had the  
15 wrong copy of verdict form. Will you indulge me to get the  
16 right one?

17 THE COURT: I certainly will, counsel. Let me know  
18 when you're ready.

19 MS. GLASSER: Sorry about that. Thanks so much.

20 THE COURT: I'll ask again, regarding the verdict  
21 form, is there any objection from either party as to the cover  
22 page, or page 1?

23 MS. GLASSER: No, Your Honor.

24 MR. DANFORD: No objection.

25 THE COURT: Turning then to page 2 where various

1 definitions are included, is there objection here from either  
2 party?

3 MS. GLASSER: No, Your Honor.

4 MR. DANFORD: No objection.

5 THE COURT: Turning to page 3 where various  
6 instructions are included, is there objection here from either  
7 party?

8 MS. GLASSER: No, Your Honor.

9 MR. DANFORD: No, Your Honor.

10 THE COURT: Turning to page 4 where Question 1 of  
11 the verdict form is situated, is there objection here from  
12 either party?

13 MS. GLASSER: No, Your Honor.

14 MR. DANFORD: Yes, Your Honor.

15 PNC has two objections to the way the Question 1 is  
16 presented to the jury. We believe that Question 1 needs to be  
17 broken out claim by claim for each patent or on a  
18 patent-by-patent basis. There are different arguments and  
19 issues for each of the patent claims, and we don't think that  
20 this is adequately resolved by an all-encompassing  
21 interrogatory to the jury.

22 And the other issue is that we believe that it's  
23 necessary, given the evidence and arguments and decisions made  
24 prior to trial, that we include separate interrogatories  
25 within the infringement issue as to literal infringement and

1 doctrine of equivalents.

2 This is an issue that Judge Payne specifically recognized  
3 when deferring on the issue of prosecution history estoppel  
4 with respect to the doctrine of equivalents arguments that  
5 have been presented here, and I think that in order to  
6 adequately address those issues post trial as Judge Payne has  
7 suggested, we need an interrogatory that breaks out separately  
8 doctrine of equivalents from literal infringement so that we  
9 can determine whether that remains a live issue post trial.

10 THE COURT: All right. Those objections are  
11 overruled. Is there anything further from either party on  
12 page 4?

13 MS. GLASSER: Not from Plaintiff, Your Honor.

14 MR. DANFORD: Not from Defendant, Your Honor.

15 THE COURT: Then we'll turn to page 5 of the verdict  
16 form where Question 2 is situated. Is there any objection  
17 here from either party?

18 MS. GLASSER: Not from Plaintiff, Your Honor.

19 MR. DANFORD: Your Honor, PNC has an objection to  
20 question -- I'm sorry. We're still on page 4, Your Honor, or  
21 are we on page 5?

22 THE COURT: I've asked twice, but if there's  
23 anything you haven't given me that you want to regarding page  
24 4 And Question 1, I'll go back. Otherwise, we're on page 5  
25 and Question 2.

1 MR. DANFORD: Your Honor, sorry. I lost the thread.  
2 If we're on page 5, we do have an objection to Question 2 on  
3 page 5.

4 THE COURT: Please state your objection.

5 MR. DANFORD: The objection is this: We had  
6 requested an interrogatory with respect to invalidity that  
7 separately broke out the issue of enablement from written  
8 description. And I think that, given the different arguments  
9 and issues and the fact that these issues pertain differently  
10 to the different patents and asserted claims, that we do need  
11 that level of specificity addressing PNC's two invalidity  
12 theories separately.

13 THE COURT: All right. That objection is overruled.  
14 Is there anything further from either party on page 5 of the  
15 verdict form?

16 MS. GLASSER: No, Your Honor.

17 MR. DANFORD: No, Your Honor.

18 THE COURT: Turn then to page 6 where Question 3 is  
19 situated. Is there objection here from either party?

20 MS. GLASSER: No, Your Honor.

21 MR. DANFORD: With respect to Question 3 on page 6,  
22 PNC reiterates the same objection that it had with respect to  
23 claim -- Question 1, that we believe that the issue of willful  
24 infringement needs to be broken out separately for each patent  
25 claim. Again, the issue of -- we believe the issue of



1 infringement needs to be resolved separately on a  
2 claim-by-claim basis, and that would carry over to the issue  
3 of willfulness as well.

4 THE COURT: All right. Anything further from  
5 Defendant on page 6?

6 MR. DANFORD: No, Your Honor.

7 THE COURT: The objections of PNC with regard to  
8 page 6 of the verdict form are overruled.

9 We'll turn next to page 7 of the verdict form where  
10 Question 4 is found. Is there objection here from either  
11 party?

12 MS. GLASSER: No, Your Honor.

13 MR. DANFORD: Yes, Your Honor.

14 PNC objects to this black box interrogatory with respect  
15 to the issue of damages, and we believe the damages should at  
16 the very least be broken out on a patent-by-patent basis.  
17 That conforms with the way that the evidence was presented at  
18 trial. And failing to break out the issue of damages this way  
19 will require a new trial on damages should there be any issues  
20 affecting the issues of liability through post trial or events  
21 at the Patent Office.

22 THE COURT: All right. That objection is overruled.  
23 Is there anything further from either party on page 7?

24 MR. DANFORD: No, Your Honor.

25 MS. GLASSER: No, Your Honor.

1 THE COURT: Turning to page 8 of the verdict form,  
2 which is the final page, is there objection here from either  
3 party?

4 MS. GLASSER: No, Your Honor.

5 MR. DANFORD: No, Your Honor.

6 THE COURT: All right. That completes the final and  
7 the formal, rather, charge conference.

8 As I indicated to you earlier at multiple times in the  
9 trial, it's my practice to provide each member of the jury  
10 with their own printed or hard copy of the final jury  
11 instructions. I do that so that I can encourage them to  
12 listen to my oral presentation as opposed to feeling compelled  
13 to take notes.

14 It will take me a few minutes to print those eight copies  
15 of the final jury instructions. And when that's been  
16 completed and I'm ready to return, I'll expect counsel to be  
17 present, bring in the jury, and proceed with my instructions  
18 and closing arguments.

19 Is there anything else that needs to be raised to this  
20 Court by either party?

21 MR. LANTIER: Yes, Your Honor, just briefly.

22 THE COURT: Go to the podium, Mr. Lantier.

23 MR. LANTIER: Your Honor, in connection with the  
24 parties' demonstrative exhibits, PNC objected to any  
25 statements during closing argument that PNC has only

1 temporarily disabled auto-capture or has an intention to  
2 reenable it. Your Honor has overruled that objection. I just  
3 wanted to note it for the record.

4 And the second one that I wanted to note was that in  
5 connection with those demonstrative exhibits, PNC objected to  
6 any statement during oral argument that version 4.20.1  
7 infringes the '571 Patent or the PNC 3 patents. And again,  
8 Your Honor has already overruled that objection, and I am just  
9 noting it for the record.

10 THE COURT: I don't know if I completely agree with  
11 your recitation. I have instructed the parties that the  
12 separate lawsuit commonly referred to by the parties as PNC 3,  
13 together with other different litigation, is not to be  
14 referred to before the jury in this case, and I'm certainly  
15 not varying from that instruction.

16 I think that's inherently confusing, and I don't expect  
17 there to be references to other lawsuits, whether they involve  
18 USAA patents or other parties and other patents before this  
19 jury.

20 MR. LANTIER: You are correct, Your Honor. And I  
21 was using PNC 3 patents to shorthand the '638 Patent, the '598  
22 Patent, and the '136 Patent.

23 THE COURT: There is a demonstrative presented for  
24 use by the Plaintiff that we've all looked at that shows the  
25 cover of those three patents. It was the same demonstrative

1 used before the jury during trial, and I'm permitting that  
2 same demonstrative be used in closing as was used in the  
3 presentation of evidence before the jury.

4 MR. LANTIER: Yes, Your Honor.

5 THE COURT: Okay. All right. The Court stands in  
6 recess.

7 (Brief recess.)

8 THE COURT: Be seated, please.

9 Are the parties prepared to read into the record any  
10 items from the list of pre-admitted exhibits used during  
11 yesterday's portion of the trial?

12 MR. BUNT: Yes, Your Honor, we are.

13 THE COURT: Please proceed.

14 MR. BUNT: Yesterday, Your Honor, USAA used DX 1236,  
15 which we are asking that the Court seal; PX 197; PX 1168; PX  
16 1470, which we ask that the Court seal; and PX 1476.

17 THE COURT: Any objection from Defendant as to that  
18 rendition?

19 MS. SMITH: No, Your Honor. But we'd ask that under  
20 the Court's standing order that parties be allowed to meet and  
21 confer and submit a sealed exhibit list.

22 THE COURT: That's permitted.

23 Does Defendant have items from the list of pre-admitted  
24 exhibits used during yesterday's portion of the trial to read  
25 into the record?

1 MS. SMITH: We do, Your Honor.

2 THE COURT: Please proceed with that.

3 MS. SMITH: Thank you. DX 328, DX 343, DX 361, DX  
4 365, DX 639, DX 679, DX 1220, DX 1236, DX 1239, DX 1241, DX  
5 1263, DX 1348, PX 2, and PX 1470.

6 THE COURT: Any objection from Plaintiff, Mr. Bunt?

7 MR. BUNT: No, Your Honor.

8 THE COURT: Thank you, counsel.

9 Ladies and gentlemen, I'm about to bring in the jury and  
10 proceed with the Court's final instructions to them, followed  
11 by counsels' closing arguments.

12 I want all of you to be aware that the Court considers  
13 this portion of the trial to be the most serious part of a  
14 very serious process. Therefore, I don't want any disruptions  
15 during my instructions -- my final instructions to the jury or  
16 counsels' closing arguments. If you have an electronic device  
17 on your person, either power it off or make sure beyond a  
18 doubt it is on silent.

19 If you have anything you need to take out of this room,  
20 get up and take it out now. I don't want people getting up  
21 walking out and coming back in. I want you to sit there  
22 quietly, attentively, and respectfully throughout my final  
23 instructions to the jury and counsels' closing argument.

24 At a different time and place, I had a judge tell me when  
25 I was in practice, he told those in the gallery, I want you to

1 sit there like it's Easter Sunday and your mother is on one  
2 side of you and your grandmother is on the other. So behave  
3 yourselves.

4 All right. Counsel, are we prepared to go forward? Is  
5 there anything else you're aware of that needs to be taken  
6 care of before I bring in the jury?

7 MR. SHEASBY: Nothing from the Plaintiff, Your  
8 Honor.

9 MR. STONE: Nothing from the Defendant, Your Honor.

10 THE COURT: Let's bring in the jury, please.

11 (Whereupon, the jury entered the courtroom.)

12 THE COURT: Good morning, ladies and gentlemen.  
13 Please have a seat.

14 Ladies and gentlemen of the jury, you've now heard all  
15 the evidence in this case, and I will now instruct you on the  
16 law that you must apply.

17 I want you to understand that each of you are going to  
18 have your own individual printed copy of these final jury  
19 instructions that I'm about to give you orally, which means  
20 you don't need to take excessive notes unless you just want  
21 to. To be honest, I would rather you listen to me as I give  
22 them to you orally, understanding you'll have your own printed  
23 copy to refer back to once you retire to deliberate.

24 It's your duty, ladies and gentlemen, to follow the law  
25 as I give it to you. On the other hand, and as I have said,

1 you, the jury, are the sole judges of the facts in this case.  
2 Do not consider any statement that I have made over the course  
3 of the trial or that I may make in the course of these  
4 instructions that the Court has any opinion about the facts in  
5 this case.

6 You are about to hear closing arguments from the  
7 attorneys from both sides. Statements and arguments of the  
8 attorneys are not evidence, and statements and arguments of  
9 the attorneys are not instructions on the law. They are  
10 intended only to assist you, the jury, in understanding the  
11 evidence and the parties' competing contentions.

12 A verdict form has been prepared for you, and you'll take  
13 this verdict form to the jury room during your deliberations.  
14 And when you've reached a unanimous agreement as to your  
15 verdict, you'll have your foreperson fill in the blanks in the  
16 verdict form reflecting those unanimous decisions, date the  
17 form, and your foreperson will sign it on behalf of the jury.  
18 And when that's done, you should notify the Court Security  
19 Officer that you've reached a verdict.

20 Answer the questions in the verdict form from the facts  
21 as you find them to be. Do not decide who you think should  
22 win this case, ladies and gentlemen, and then answer the  
23 questions to reach that result. Remember, your answers and  
24 your verdict must be unanimous.

25 Now, in determining whether any fact has been proven in

1 this case, you may, unless otherwise instructed, consider the  
2 testimony of all the witnesses, regardless of who may have  
3 called them; you may consider any stipulations of the parties;  
4 and you may consider all the exhibits that have been received  
5 into evidence during the course of the trial, regardless of  
6 who may have presented or introduced them.

7 Ladies and gentlemen, you are the sole judges of the  
8 credibility of all the witnesses and the weight and effect to  
9 give to all of the evidence. In deciding the facts in this  
10 case, you may have to decide which testimony to believe and  
11 which testimony not to believe. You alone are to determine  
12 the questions of credibility or truthfulness of the witnesses.

13 In weighing the testimony of the witnesses, you may  
14 consider a witness' manner and demeanor on the witness stand,  
15 any feelings or interest that they may have in the case, any  
16 prejudice or bias about the case that the witness may have,  
17 and the consistency or inconsistency of their testimony,  
18 considered in the light of the circumstances. Has the witness  
19 been contradicted by other evidence? Has he or she made  
20 statements at other times and at other places contrary to what  
21 they said on the witness stand? You, ladies and gentlemen,  
22 must give the testimony of each witness the amount of  
23 credibility and weight that you alone think it deserves.

24 You must also keep in mind that a simple mistake does not  
25 necessarily mean that a witness is not telling the truth. You



1 must consider whether any misstatement was an intentional  
2 falsehood or a simple lapse in memory, and what significance  
3 should be attached to that testimony.

4 As I've told you before, the attorneys in this case are  
5 advocates for their competing parties. They have a duty to  
6 object when they believe evidence is offered that should not  
7 be admitted under the rules of the Court.

8 When the Court sustained an objection to a question  
9 addressed to a witness, you must disregard the question  
10 entirely, and you may draw no inference from its wording or  
11 speculate about what the witness would have said if he or she  
12 had been permitted to answer the question. On the other hand,  
13 if the objection was overruled, then you may treat the  
14 question and the answer just as you would any other question  
15 and answer as though the objection had never been made.

16 Now, by allowing testimony or other evidence to be  
17 introduced over the objection of an attorney, the Court did  
18 not indicate any opinion as to the weight or effect of that  
19 evidence. Again, that's a decision that's left solely to you,  
20 the jury.

21 Now, at times during the course of this trial, ladies and  
22 gentlemen, it's been necessary for the Court to talk to the  
23 lawyers outside of your hearing, either at the bench privately  
24 or by talking to them when you are on recess outside of the  
25 courtroom. This happens because during trials there are

1 things that arise that do not involve the jury. You should  
2 not speculate about what was said during any discussions that  
3 took place outside of your presence.

4 Now, there are two types of evidence that you may  
5 consider in properly finding the truth as to the facts in this  
6 case. One is direct evidence such as the testimony of an  
7 eyewitness, and the other is indirect or circumstantial  
8 evidence, that is, the proof of a chain of circumstances that  
9 indicates the existence or non-existence of certain other  
10 facts. As a general rule, the law makes no distinction  
11 between direct or circumstantial evidence, but simply requires  
12 that you find the facts based on the evidence presented, both  
13 direct and circumstantial.

14 Now, the parties may have agreed or stipulated to some  
15 facts in this case, and when lawyers on both sides of the case  
16 stipulate as to the existence of a fact, you must, unless  
17 otherwise instructed, accept the stipulation as evidence and  
18 regard the fact as proven.

19 Also, while you should consider only the evidence in this  
20 case, you are permitted to draw such reasonable inferences  
21 from the testimony and the exhibits as you feel are justified  
22 in the light of common experience. Let me say that another  
23 way, ladies and gentlemen. You may make deductions and you  
24 may reach conclusions that reason and common sense lead you to  
25 draw from the facts that have been established by the

1 testimony and the evidence in this case. However, you should  
2 not base your decisions on any evidence not presented by the  
3 parties during the trial of this case, including your own  
4 personal experiences with any of the products that were at  
5 issue in this case.

6 Now, unless I instruct you otherwise, you may properly  
7 determine that the testimony of a single witness may be  
8 sufficient to prove any fact, even if a greater number of  
9 witnesses may have testified to the contrary, if after  
10 considering all of the evidence you believe that single  
11 witness.

12 When knowledge of a technical subject may be helpful to  
13 the jury, a person who has special training or experience in  
14 that technical field, we call them an expert witness, is  
15 permitted to state his or her opinions on those technical  
16 matters to the jury. However, ladies and gentlemen, you are  
17 not required to accept those opinions. As with any other  
18 witness, it is solely up to you whether to rely upon the  
19 testimony of a witness, whether a fact witness or an expert  
20 witness, or whether not to rely upon that testimony.

21 Also, certain exhibits have been shown to you during the  
22 trial which were illustrations. We call these types of  
23 exhibits demonstrative exhibits or sometimes simply  
24 demonstratives. Demonstrative exhibits are a party's  
25 depiction, picture, or model to describe something involved in

1 the trial. If your recollection of the evidence differs from  
2 these demonstratives, you should rely on your recollection.  
3 Demonstrative exhibits are sometimes called jury aides, and  
4 demonstrative exhibits, ladies and gentlemen, are not  
5 evidence, but the witness' testimony concerning a  
6 demonstrative is evidence. These demonstrative exhibits are  
7 not going to be available to you to view or consider during  
8 your deliberations.

9 Now, in any legal action, facts must be proven by a  
10 required amount of evidence known as the burden of proof. The  
11 burden of proof in this case is on the Plaintiff for some  
12 issues and on the Defendant for other issues. And there are  
13 two burdens of proof that you will apply in this case. The  
14 first is the preponderance of the evidence; the second is  
15 clear and convincing evidence.

16 Now, the Plaintiff in this case, United Services  
17 Automobile Association, which you've heard throughout the  
18 trial referred to as USAA or simply as the Plaintiff, USAA has  
19 the burden of proving patent infringement by a preponderance  
20 of the evidence. USAA also has the burden of proving willful  
21 patent infringement by a preponderance of the evidence. And  
22 USAA has the burden of proving damages for any patent  
23 infringement by a preponderance of the evidence.

24 A preponderance of the evidence means evidence that  
25 persuades you that a claim is more probably true than not true

1 and is sometimes talked about as being the greater weight and  
2 degree of credible testimony.

3 Now, the Defendant in this case, PNC Bank, N.A., which  
4 you've heard referred to throughout the trial simply as PNC or  
5 as the Defendant, PNC has the burden of proving invalidity of  
6 USAA's patent claims by clear and convincing evidence. Clear  
7 and convincing evidence means evidence that produces in your  
8 mind an abiding conviction that the truth of the party's  
9 factual contentions are highly probable.

10 Now, although proof to an absolute certainty is not  
11 required, the clear and convincing evidence standard requires  
12 a greater degree of persuasion than is necessary for the  
13 preponderance of the evidence standard. If proof establishes  
14 in your mind, ladies and gentlemen, an abiding conviction in  
15 the truth of the matter, the clear and convincing evidence  
16 standard has been met.

17 Now, as I've previously told you, these two burdens of  
18 proof are not in any way to be confused with a separate burden  
19 of proof called beyond a reasonable doubt, which is the burden  
20 of proof applied in a criminal case and which has no  
21 application whatsoever in a civil case such as this. Beyond a  
22 reasonable doubt is a higher burden of proof than both the  
23 preponderance of the evidence standard and the clear and  
24 convincing evidence standard.

25 Now, as I did at the beginning of the case, I'm going to

1 first give you a summary of each side's contentions, and I'll  
2 then provide you with detailed instructions on what each side  
3 must prove to win on each of its contentions.

4 As I previously told you, this is an action for patent  
5 infringement. USAA contends that PNC infringes certain claims  
6 of the patents-in-suit. Remember, there are four  
7 patents-in-suit: U.S. Patent No. 10,482,432, which you've  
8 heard referred to as the '432 Patent; U.S. Patent No.  
9 10,013,681, which you've heard referred to as the '681 Patent;  
10 U.S. Patent number 10,013,605, which you've heard to referred  
11 to as the '605 Patent; and U.S. Patent No. 8,977,571, which  
12 you've heard referred to as the '571 or the '571 Patent. And  
13 I'll remind you you have a copy of each of these patents in  
14 your juror notebooks.

15 USAA, ladies and gentlemen, the Plaintiff, contends that  
16 PNC, the Defendant, infringes the following claims of the  
17 patents-in-suit: Claims 1, 3, 5, and 21 of the '432 Patent;  
18 claims 12, 13, 22, 26, and 30 of the '681 Patent; and claims  
19 12, 13, and 22 of the '605 Patent; together with claims 1, 2,  
20 9, 12, and 13 of the '571 Patent. These are the asserted  
21 claims.

22 USAA contends that PNC has infringed the asserted claims  
23 by making, using, selling, importing, or offering for sale the  
24 PNC Mobile Deposit System. And I'll refer to this as the  
25 accused product.

1           USAA further alleges that PNC's infringement of the  
2           asserted patents was willful. USAA contends that it is  
3           entitled to money damages in the form of a reasonable royalty  
4           for PNC's infringement, and USAA has the burden to prove each  
5           of these issues by a preponderance of the evidence.

6           The Defendant PNC denies that it infringes any of these  
7           asserted claims. PNC denies that it makes, uses, offers for  
8           sale, sells, or imports any accused product that infringes any  
9           of the asserted claims. PNC also denies that any alleged  
10          infringement was willful. PNC also denies that it owes USAA  
11          any money damages.

12          PNC further contends that the asserted claims of the  
13          patents-in-suit are invalid for failure to satisfy the written  
14          description and enablement requirements. Invalidity, ladies  
15          and gentlemen, is a defense to infringement. PNC has the  
16          burden of proving invalidity by clear and convincing evidence.

17          Now, invalidity and infringement are separate and  
18          distinct issues, and your job is to decide whether PNC has  
19          infringed any of the asserted claims and whether those claims  
20          are invalid. If you decide that any of the asserted claims  
21          have been infringed and those claims are not invalid, then  
22          you'll need to decide the amount of money damages, if any, to  
23          be awarded to USAA to compensate it for that infringement.

24          If you decide that there was any infringement and that it  
25          was willful, that decision as to willfulness should not affect

1 any damages that you award. The Court will take willfulness  
2 into account later. It should not impact your damages award  
3 in any way.

4 Now, before you can decide many of the issues in this  
5 case, you need to understand the role of the patent claims.  
6 The patent claims are those numbered sentences at the end of  
7 each patent.

8 The claims are important, ladies and gentlemen, because  
9 it's the words of the claims that define what a patent covers.  
10 The figures and the text in the rest of the patent provide a  
11 description and/or examples of the invention, and they provide  
12 a context for the claims, but it is the claims themselves that  
13 define the breadth of the patent's coverage. Each claim is  
14 effectively treated as if it were a separate patent, and each  
15 claim may cover more or may cover less than another claim.  
16 Accordingly, what a patent covers depends in turn on what each  
17 of its claims covers.

18 You will first need to understand what each claim covers  
19 in order to decide whether or not there is infringement of the  
20 claim and to decide whether or not the claim is invalid. Now,  
21 the law says that it's my role to define the terms of the  
22 claims and it's your role to apply my definitions to the  
23 issues that you are asked to decide in this case.

24 Therefore, as I explained to you at the start of the  
25 case, I have determined already the meanings of the claims,



1 and I've provided to you my definitions of certain claim  
2 terms. And these definitions can be found in your juror  
3 notebooks, and you are free to refer to them at any time.

4 You must accept, ladies and gentlemen, my definitions of  
5 those words in the claims as being correct. It's your job to  
6 take these definitions and apply them to the issues that you  
7 are deciding, including the issues of infringement and  
8 invalidity. You should disregard any evidence presented  
9 during the trial that contradicts or is inconsistent with  
10 these constructions and definitions that the Court has given  
11 you.

12 Now, for any claim limitations or language that I have  
13 not construed--that is, limitation or language that I have not  
14 interpreted or defined--you are to use and apply the plain and  
15 ordinary meaning of those limitations or language as  
16 understood by one of ordinary skill in the art, which is to  
17 say, in the field of the technology of the patent at the time  
18 of the alleged invention.

19 The meaning of the words of the patent claims must be the  
20 same when deciding both infringement and when deciding  
21 invalidity, and you've been provided, as I noted, with copies  
22 of the asserted patents in your juror notebooks and you've  
23 been provided with the Court's definitions of certain claim  
24 language in your juror notebooks and you are free to refer to  
25 those throughout your deliberations.

1           Now, several times in these instructions, I have referred  
2     to or will make reference to a person of ordinary skill in the  
3     field of the invention, or a person of ordinary skill in the  
4     art. In deciding the level of ordinary skill in the field,  
5     you should consider all the evidence introduced at the trial,  
6     including but not limited to: (1) the levels of education and  
7     experience of the inventor or other persons actively working  
8     in the field; (2) the types of problems encountered in the  
9     field; (3) previous solutions to those problems; (4) the  
10    rapidity with which the innovations are made; and (5) the  
11    sophistication of the technology.

12           Now, the claims are intended to define in words the  
13    boundaries of the inventor's rights. Only the claims of the  
14    patent can be infringed. Neither the written description nor  
15    the drawings of the patent can be infringed. Each claim must  
16    be considered individually.

17           I'll now explain how a claim defines what it covers.

18           A claim, ladies and gentlemen, sets forth in words a set  
19    of requirements. Each claim sets forth its requirements in a  
20    single sentence. If a product satisfies each of these  
21    requirements, then it is covered by the claim.

22           There can be several claims in a patent. Each claim may  
23    be narrower or broader than another claim by setting forth  
24    more or fewer requirements. The coverage of a patent is  
25    assessed on a claim-by-claim basis.

1 In patent law, the requirements of a claim are often  
2 referred to as the claim elements or the claim limitations.  
3 And when a product meets all the requirements of a claim, the  
4 claim is said to cover that product and that product is said  
5 to fall within the scope of that claim. In other words, a  
6 claim covers a product where each of the claim elements or  
7 limitations is present in that product. If a product is  
8 missing even one limitation or element of a claim, the product  
9 is not covered by the claim. And if the product is not  
10 covered by the claim, the product cannot infringe that claim.

11 Now, the beginning portion or preamble of a claim often  
12 uses the word 'comprising'. The word 'comprising', when used  
13 in the preamble of a patent claim, means including but not  
14 limited to, or containing but not limited to. When comprising  
15 is used in the preamble, if you decide that an accused product  
16 includes all of the requirements of that claim, the claim is  
17 infringed, and this is true even if the accused product  
18 contains additional or other elements.

19 For example, a claim to a table comprising a tabletop,  
20 legs, and glue, would be infringed by a table that includes a  
21 tabletop, legs, and glue, even if a table also contains other  
22 structures, such as leaves to expand the size of the tabletop  
23 or wheels to go on the ends of the legs.

24 Now, claims 1 and 9 of the '571 Patent are in a special  
25 form called means-plus-function format. These claims do not

1 cover all the structures that could perform the functions set  
2 out in the claim. Instead, they cover a structure or set of  
3 structures that perform that function and that is either  
4 identical or equivalent to the structures described in the  
5 patent for performing the function. The issue of whether two  
6 structures are identical or equivalent is for you to decide.

7 This case also involves two types of patent  
8 claims--independent claims and dependent claims. In this  
9 case, claim 1 of the '432 Patent and claims 12 and 30 of the  
10 '681 Patent, and claim 12 of the '605 Patent, and claims 1 and  
11 9 of the '751 [sic] Patent are independent claims. Claims 3,  
12 5, and 21 of the '432 Patent, claims 13, 22, and 26 of the  
13 '681 Patent, and claims 13 and 22 of the '605 Patent, together  
14 with claims 2, 12, and 13 of the '571 Patent, are dependent  
15 patent claims.

16 An independent claim, ladies and gentlemen, sets forth  
17 all the requirements that must be met in order to be covered  
18 by that claim. It is not necessary to look at any other claim  
19 to determine what an independent claim covers.

20 However, a dependent claim does not itself recite all the  
21 requirements of the claim, but refers to another claim for  
22 some of its requirements. In this way, the claim depends on  
23 another claim, and the dependent claim incorporates all the  
24 requirements of the claim to which it refers or, said another  
25 way, from which it depends, and then the dependent claim adds

1 its own additional requirements.

2 So to determine what a dependent claim covers, it's  
3 necessary to look at both the dependent claim itself and any  
4 other claim or claims to which it refers or from which it  
5 depends. A product that meets all the requirements of both  
6 the dependent claim and the claim or claims to which it refers  
7 or from which it depends is covered by that dependent claim.

8 Now, if a person or a corporation makes, uses, sells, or  
9 offers to sell within the United States, or imports into the  
10 United States what is covered by a patent claim without the  
11 patentholder's permission, that person or corporation is said  
12 to infringe the patent.

13 In reaching your decision on infringement, keep in mind  
14 that only the claims of a patent can be infringed. You must  
15 compare the asserted patent claims, as I have construed them  
16 for you, to the accused product, to determine whether or not  
17 there is infringement. This is the only correct comparison.

18 And you should not compare the accused product with any  
19 of the specific examples set out in the patent with the prior  
20 art or with USAA's own products in reaching your decision on  
21 infringement. Again, in deciding infringement, the only  
22 correct comparison is between the accused product of PNC and  
23 the limitations and elements of the claims as the Court has  
24 construed them, the asserted claims.

25 You must reach your decision as to each assertion of

1 infringement based on my instructions about the meaning and  
2 scope of the claims, the legal requirements for infringement,  
3 and the evidence presented to you by both of the parties  
4 during the course of this trial.

5 I'll now instruct you on the specific rules that you must  
6 follow to determine whether USAA has proven that PNC has  
7 directly infringed one or more of the patent claims involved  
8 in this case.

9 A patent can be directly infringed even if the alleged  
10 direct infringer did not have knowledge of the patent and  
11 without the direct infringer knowing that what it did was  
12 infringement of the claim. A patent may also be directly  
13 infringed even though the accused direct infringer believed in  
14 good faith that what it did was not infringement of the  
15 patent. Infringement does not require proof that a party  
16 copied its product from the asserted claims.

17 Now, you must determine separately for each asserted  
18 claim whether or not there is infringement. However, if you  
19 find that an independent claim on which other claims depend is  
20 not infringed, there cannot be infringement of any independent  
21 claim -- excuse me, any dependent claim that refers directly  
22 or indirectly to that independent claim.

23 On the other hand, if you find that an independent claim  
24 has been infringed, you must still decide separately whether  
25 the product meets the additional requirements of any claims

1 that depend from that independent claim--that is, whether  
2 those claims have also been infringed. Again, a dependent  
3 claim includes all the requirements of any claims to which it  
4 refers or from which it depends plus the additional  
5 requirements of the dependent claim itself.

6 Now, in order to prove direct infringement of a patent  
7 claim, USAA, the Plaintiff, must show by a preponderance of  
8 the evidence that the accused product includes each and every  
9 limitation of the claim, either literally or under the  
10 doctrine of equivalents. In determining whether the accused  
11 product directly infringes a patent claim in this case, you  
12 must compare the accused product with each and every one of  
13 the requirements or limitations of that claim to determine  
14 whether the accused product contains each and every  
15 requirement or limitation recited in the claim. An accused  
16 product infringes a claim if it is reasonably capable of  
17 satisfying the claim elements, even though it may also be  
18 capable of non-infringing modes of operation.

19 A claim requirement is literally present if it exists in  
20 an accused product just as it is described in the claim  
21 language, either as I have explained that language to you or,  
22 if I did not explain it, as would be understood by its plain  
23 and ordinary meaning of one of ordinary skill in the art. If  
24 an accused product omits any element recited in a claim, then  
25 you must find that the product in question does not literally

1 infringe that claim.

2 So long as an accused product has each and every one of  
3 the claim requirements, infringement of that claim is shown,  
4 even if the product contains additional features or elements  
5 not required by the claims.

6 In this case PNC, the Defendant, is accused of direct  
7 infringement. PNC asserts that it has not directly infringed  
8 the patents-in-suit because it did not provide all the  
9 components necessary to make, sell, offer for sale, or import  
10 an infringing product, because another party provided one or  
11 more of the components necessary to infringe, such as a  
12 handheld mobile device.

13 If you find that PNC provided all the components  
14 necessary to infringe, or that the components provided for  
15 another party or are attributable to PNC, then PNC directly  
16 infringed. You may find that the components provided by  
17 another party are attributable to PNC if you find that PNC  
18 exercised direction or control over another party when the  
19 other party provided and used such components.

20 If you do not find that each element of a claim is  
21 literally met, then you may still find infringement if you  
22 find that each element is met under the doctrine of  
23 equivalents. If a person makes, uses, sells, or offers to  
24 sell within the United States, or imports into the United  
25 States, a product that does not meet all of the elements or



1 limitations of a claim and, thus, does not literally infringe  
2 the claim, there can still be direct infringement if that  
3 product or method satisfies that claim under the doctrine of  
4 equivalents.

5 Under the doctrine of equivalents, ladies and gentlemen,  
6 the accused product infringes a claim if it contains elements  
7 or limitations corresponding to each and every element or  
8 limitation of the claim that is equivalent to, even though not  
9 literally met by, the accused product.

10 You may find that an accused product is equivalent to an  
11 element or limitation of a claim that is not met literally if  
12 a person having ordinary skill in the field of the technology  
13 of the patent would have considered the differences between  
14 them to be insubstantial, or would have found that the accused  
15 product performs substantially the same function in  
16 substantially the same way to achieve substantially the same  
17 result as the element or limitation of the claim. In order  
18 for the structure or action to be considered interchangeable,  
19 the structure or action must have been known at the time of  
20 the alleged infringement to a person having ordinary skill in  
21 the field of the technology of the patent. Interchangeability  
22 at the present time is not sufficient.

23 Now, in order to prove direct infringement under the  
24 doctrine of equivalents, USAA must prove by a preponderance of  
25 the evidence that each claim element or limitation not

1 literally present in the accused product -- excuse me. Let me  
2 start that again.

3 In order to prove direct infringement under the doctrine  
4 of equivalents, USAA must prove by a preponderance of the  
5 evidence that for each claim limitation or element not  
6 literally present in the accused product, the equivalent of  
7 that claim element or limitation is present.

8 USAA also contends that PNC has willfully infringed the  
9 patents-in-suit. If you decide that PNC has infringed, you  
10 must go on to address the issue of whether or not that  
11 infringement was willful. USAA has the burden of proving  
12 willful infringement by a preponderance of the evidence. You  
13 may not determine that infringement was willful just because  
14 PNC knew of the asserted patents and infringed them. You may  
15 find that PNC willfully infringed if you find that PNC  
16 deliberately or intentionally infringed the asserted patents.

17 You may find that PNC's actions were willful if PNC acted  
18 in reckless or callous disregard of or with indifference to  
19 the rights of USAA. A defendant is indifferent to the rights  
20 of another when it proceeds in disregard of a high or  
21 excessive danger of infringement that is known to it or was  
22 apparent to a reasonable person in its position.

23 To determine whether PNC acted willfully, consider all  
24 the facts and assess PNC's knowledge at the time of the  
25 challenged conduct. Facts that may be considered include

1 whether or not PNC reasonably believed that it did not  
2 infringe or that the asserted patents were invalid. You may  
3 find that PNC's actions were deliberate or intentional if PNC  
4 was willfully blind to USAA's patent rights.

5 Now, your determination of willfulness, ladies and  
6 gentlemen, should incorporate the totality of the  
7 circumstances based on the evidence presented throughout this  
8 trial. Willfulness can be established by circumstantial  
9 evidence. Now, if you decide that any infringement was  
10 willful, that decision should not affect any damages award  
11 that you will make. Again, the Court will take willfulness  
12 into account later.

13 I'll now instruct you on the rules that you must follow  
14 in deciding whether or not PNC has proven that any asserted  
15 claims of the asserted patents are invalid. An issued United  
16 States patent is accorded a presumption of validity based on  
17 the presumption that the U.S. Patent and Trademark Office,  
18 which you've heard called throughout the trial the PTO, or  
19 sometimes you've heard it called simply the Patent Office,  
20 acted correctly in issuing the patent. This presumption of  
21 validity extends to all issued United States patents.

22 Now, in order to overcome this presumption, PNC, the  
23 Defendant, must establish by clear and convincing evidence  
24 that a claim is invalid. Like infringement, ladies and  
25 gentlemen, invalidity is determined on a claim-by-claim basis,

1 and you must determine separately for each claim whether that  
2 claim is invalid. If one claim of a patent is invalid, this  
3 does not mean that any other claim is necessarily invalid.

4 Claims are to be construed in the same way for  
5 determining infringement as for determining invalidity, and  
6 you must apply the claim language consistently and in the same  
7 manner for issues of infringement as for issues of invalidity.  
8 In making your determination as to invalidity, you should  
9 consider each claim separately.

10 Now, PNC contends that the asserted claims of the  
11 patents-in-suit are invalid for failure to satisfy the written  
12 description requirement. As I previously explained, to obtain  
13 a patent, one must first file an application with the U.S.  
14 Patent and Trademark Office, or the PTO. The process of  
15 obtaining a patent is called patent prosecution. And the  
16 application submitted to the PTO includes within it what is  
17 called a specification.

18 The specification is required to contain a written  
19 description of the claimed invention telling what the  
20 invention is, how it works, how to make it, and how to use it.  
21 The written description requirement is designed to ensure that  
22 the inventor was in possession of the full scope of the  
23 claimed invention as of the patent's priority date.

24 Now, to succeed on its claims of lack of adequate written  
25 description as to the patents-in-suit, PNC must show by clear

1 and convincing evidence that a person having ordinary skill in  
2 the field reading the patent specification as of the priority  
3 date of the patent would not have understood that the  
4 specification describes the full scope of the invention as it  
5 is claimed in the claims of that patent. If the patent claims  
6 lack adequate written description, then the claim is invalid.

7 In deciding whether the patents-in-suit satisfy the  
8 written description requirement, you must consider the  
9 description from the viewpoint of a person having ordinary  
10 skill in the field of the technology of the patent as of the  
11 filing date of the patents-in-suit. The specification, ladies  
12 and gentlemen, must describe the full scope of the claimed  
13 invention, including each element thereof, either expressly or  
14 inherently. A claimed element is disclosed inherently if a  
15 person having ordinary skill in the field as of the priority  
16 date would have understood that the element is necessarily  
17 present in what the specification discloses.

18 The written description does not have to be in the exact  
19 words of the claim. The requirement may be satisfied by any  
20 combination of the words, structures, figures, diagrams,  
21 formulas, et cetera, contained in the patent specification.  
22 Adequate written description does not require either examples  
23 or an actual reduction to practice of the claimed invention.

24 However, a mere wish or plan for obtaining the claimed  
25 invention is not adequate written description. Rather, the

1 level of disclosure required depends on a variety of factors,  
2 such as the existing knowledge in the particular field, the  
3 scope and content of the prior art, the maturity of the  
4 science or technology, and other considerations appropriate to  
5 the subject matter. The issue of written description is  
6 decided on a claim-by-claim basis, not as to the entire patent  
7 or groups of patents.

8 Now, another way that a patent can be invalid is if it  
9 fails to disclose sufficient information to enable or teach  
10 persons of ordinary skill in the field of the invention, as of  
11 the effective filing date, to make and use the full scope of  
12 the claimed invention without undue experimentation. This  
13 requirement is known as the enablement requirement, and the  
14 defendant in this case, PNC, contends that the asserted claims  
15 of the asserted patents are invalid for lack of enablement.  
16 If a patent claim is not enabled, ladies and gentlemen, it is  
17 invalid.

18 To consider whether a patent complies with the enablement  
19 requirement, you must keep in mind that patents are written  
20 for persons of ordinary skill in the field of the invention.  
21 Thus, a patent need not expressly state information that  
22 persons of ordinary skill would be likely to know or could  
23 obtain without undue experimentation.

24 Factors that you may consider in determining whether  
25 persons of ordinary skill in the field of the invention would

1 require undue experimentation to make and use the full scope  
2 of the claimed invention include:

3 1. The quantity of experimentation necessary and whether  
4 that experimentation involves only known or commonly used  
5 techniques. The question of undue experimentation is a matter  
6 of degree. Even extensive experimentation does not  
7 necessarily make the experiments unduly extensive where the  
8 experiments are routine, such as repetition of known or  
9 commonly used techniques. But permissible experimentation is  
10 not without bounds.

11 2. The amount of direction or guidance disclosed in the  
12 patent.

13 3. The presence or absence of working examples in the  
14 patent.

15 4. The nature of the invention.

16 5. The state of the prior art.

17 6. The relative skill of those in the art.

18 7. The predictability of the art; and

19 8. The breadth of the claims.

20 Now, no one of these factors alone is dispositive.

21 Rather, you must make your decision about whether or not the  
22 degree of experimentation required is undue based on all of  
23 the evidence presented to you. You should weigh these factors  
24 and determine whether or not, in the context of this invention  
25 and the state of the art at the time of the effective filing

1 date, a person having ordinary skill would need to experiment  
2 unduly to make and use the full scope of the claimed  
3 invention.

4 If you find that PNC has infringed any valid claims of  
5 the asserted patents, you must then consider what amount of  
6 damages, if any, to award to USAA.

7 I'm now going to instruct you about the measure of  
8 damages, but by instructing you on damages, ladies and  
9 gentlemen, I am not suggesting which party should win this  
10 case on any issue. If you find that PNC has not infringed any  
11 valid claim of the patents-in-suit, then USAA is not entitled  
12 to any patent damages.

13 USAA has the burden to establish the amount of its  
14 damages by a preponderance of the evidence. In other words,  
15 you should award only those damages that USAA establishes that  
16 it more likely than not suffered as a result of PNC's  
17 infringement. Now, while USAA is not required to prove the  
18 amount of its damages with mathematical precision, it must  
19 prove them with reasonable certainty. USAA is not entitled to  
20 damages that are remote or that are only speculative.

21 The damages that you award, if any, must be adequate to  
22 compensate USAA for any infringement that you may find. You  
23 must not award USAA more damages than are adequate to  
24 compensate it for the infringement. And you must also not  
25 include any amount for the purpose of punishing PNC or for



1 setting an example.

2 I'll now instruct you about how to calculate reasonable  
3 royalty damages.

4 A royalty is a payment made to a patentholder in exchange  
5 for the right to make, use, or sell the claimed invention. A  
6 reasonable royalty is the amount of royalty payment that a  
7 patentholder and an alleged infringer would have agreed to in  
8 a hypothetical negotiation taking place at a time prior to  
9 when the infringement first began.

10 In considering this hypothetical negotiation, you should  
11 focus on the expectations of the patentholder and the alleged  
12 infringer and would they have -- what they would have been had  
13 they entered into an agreement at that time, and had they  
14 acted reasonably in their negotiations. In determining this,  
15 you must assume that both parties believed the patent was  
16 valid and infringed and that both parties were willing to  
17 enter into an agreement.

18 The reasonable royalty you determine must be a royalty  
19 that would have resulted from the hypothetical negotiation and  
20 not simply a royalty that either party would have preferred.  
21 Evidence of things that happened after infringement first  
22 began can be considered in evaluating the reasonable royalty  
23 only to the extent that the evidence aids in assessing what  
24 royalty would have resulted from a hypothetical negotiation.

25 Although evidence of the actual profits an alleged

1     infringer made may be used to determine the anticipated  
2     profits at the time of the hypothetical negotiation, the  
3     royalty may not be limited or increased based on the actual  
4     profits the alleged infringer made.

5             The law requires that any royalty awarded to USAA  
6     correspond to the value the alleged inventions  
7     within -- correspond to the value of the alleged inventions  
8     within the accused product, as distinct from other unpatented  
9     features of the accused product. And this is particularly  
10    true where the accused product has multiple features and  
11    multiple components not covered by the patent, or where the  
12    accused product works in conjunction with other non-patented  
13    items.

14            If unpatented features contribute to the accused product,  
15    you must apportion that value to exclude any value  
16    attributable to unpatented features. You must determine an  
17    appropriate royalty rate and an appropriate royalty base that  
18    reflect the value attributable to the patented invention  
19    alone.

20            In determining the reasonable royalty, ladies and  
21    gentlemen, you should consider all the facts known and  
22    available to the parties at the time infringement began.

23            Some of the kinds of factors that you may consider in  
24    making your determination are:

25            1. The royalties received by the patentee for the

1     licensing of the patents-in-suit proving or tending to prove  
2     an established royalty.

3             2. The rates paid by the licensee for the use of other  
4     patents comparable to the patent-in-suit. Comparable license  
5     agreements include those covering the use of the claimed  
6     invention or similar technology.

7             34. The nature and scope of the license as exclusive or  
8     non-exclusive or as restricted or unrestricted --  
9     non-restricted in terms of territory or with respect to whom  
10    the manufactured product may be sold.

11            4. The licensor's established policy and marketing  
12    program to maintain its patent exclusivity by not licensing  
13    others to use the invention or by granting licenses under  
14    special conditions designed to preserve that exclusivity.

15            5. The commercial relationship between the licensor and  
16    licensee, such as whether they are competitors in the same  
17    territory in the same line of business.

18            6. The effect of selling the patented specialty in  
19    promoting sales of other products of the licensee, the  
20    existing value of the invention to the licensor as a generator  
21    of sales of his non-patented items, and the extent of such  
22    derivative or convoyed sales.

23            7. The duration of the patent and the term of the  
24    license.

25            8. The established profitability of the product made

1 under the patents, its commercial success, and its current  
2 popularity.

3 9. The utility and advantages of the patented property  
4 over the old modes or devices, if any, that had been used for  
5 working out similar results.

6 10. The nature of the patented invention, the character  
7 of the commercial embodiment of it as owned and produced by  
8 the licensor and the benefits to those who have used the  
9 invention.

10 11. The extent to which the infringer has made use of  
11 the invention and any evidence probative of the value of that  
12 use.

13 12. The portion of the profit or of the selling price  
14 that may be customary in the particular business or in  
15 comparable businesses to allow for the use of the invention or  
16 analogous inventions.

17 13. The portion of the realizable profits that should be  
18 credited to the invention as distinguished from non-patented  
19 elements, the manufacturing process, business risks, or  
20 significant features or improvements added by the infringer.

21 14. The opinion and testimony of qualified experts; and

22 15. The amount that a licensor (such as the patentee)  
23 and a licensee (such as the infringer) would have agreed upon  
24 at the time the infringement began if both had been trying  
25 reasonably and voluntarily to reach an agreement; that is, the

1 amount which a prudent licensee--who desired as a business  
2 proposition to obtain a license to the patented  
3 invention--would have been willing to pay as a royalty and yet  
4 be able to make a reasonable profit and which amount would  
5 have been acceptable to a prudent patentee who was willing to  
6 grant a license.

7       You may have heard these factors referred to during the  
8 trial as the *Georgia-Pacific* factors. Please understand, no  
9 one of these factors is dispositive, and you can and should  
10 consider all the evidence that's been presented to you in this  
11 case on each of these factors. You may also consider any  
12 other factors which, in your mind, would have increased or  
13 decreased the royalty the alleged infringer would have been  
14 willing to pay and the patentholder would have been willing to  
15 accept, acting as normally prudent business people.

16       In determining a reasonable royalty, you may also  
17 consider evidence concerning the availability and cost of  
18 acceptable non-infringing substitutes or alternatives to the  
19 patented invention. An acceptable substitute or alternative  
20 must be a product that does not infringe the patent, and as a  
21 part of USAA having the burden to prove its damages, USAA has  
22 the responsibility to show there were no acceptable  
23 non-infringing substitutes.

24       For a substitute or alternative to be an acceptable  
25 non-infringing substitute or alternative, it must have been

1 available to be used during the period of infringement. A  
2 substitute or alternative that infringes other patents held by  
3 the Plaintiff cannot be used by the Defendant as a  
4 non-infringing substitute or alternative.

5 In calculating damages, ladies and gentlemen, you must  
6 consider whether or not USAA or its licensees marked the  
7 products that practice the asserted patents by placing on or  
8 within those patents the word 'patent' or Pat. and the  
9 asserted patent numbers. If you find USAA or its licensees  
10 failed to properly mark their respective products, then you  
11 may only award damages to USAA for infringement that occurred  
12 after the date that USAA gave actually notice to PNC that USAA  
13 believed PNC was infringing the asserted patents. It will be  
14 up to you to decide when such notice occurred.

15 Now, with these instructions, ladies and gentlemen, we'll  
16 proceed to hear closing arguments from the attorneys in this  
17 case.

18 The Plaintiff may now present its first closing argument  
19 to the jury. Would you like a warning on your time, Mr. Bunt?

20 MR. BUNT: Yes, Your Honor. May Mr. Sheasby and I  
21 have a warning when we have used 20 minutes of our time?

22 THE COURT: I'll warn you when 20 minutes been used.  
23 You may proceed.

24 MR. BUNT: May it please the Court.

25 Good morning, ladies and gentlemen. On behalf of USAA,

1 I'd like to thank you for your time and your service here this  
2 past week. I know that many of you have had to travel a long  
3 distance to get here, and I've watched and I've seen how  
4 everybody has concentrated so hard on all the evidence that's  
5 come in. So thank you very much for that and for your  
6 service.

7 Some of you-all may remember many years ago there was a  
8 book that came out that was very popular, and it was called,  
9 All I Really Need to Know, I Learned in Kindergarten. And in  
10 that book the author said that most of the important wisdom  
11 came not from the top of the graduate school mountain, but  
12 from the sand pile and Sunday School. And some of those  
13 important lessons, those basic values that he talked about in  
14 that book included the play fair and don't take things that  
15 aren't yours.

16 When our founders enshrined our jury trial system into  
17 the Constitution, they understood that the wisdom that regular  
18 folks could provide to disputes like this one would be  
19 instrumental to our system of justice.

20 Now, during deliberations, I would like for you to  
21 consider what you have heard from PNC in this courtroom.

22 At a very high level, this is what they have said.  
23 First, they claim they don't infringe, but if they do, it  
24 doesn't matter because USAA's patents are invalid. But if you  
25 reject that, then they don't owe very much money. It's kind

1 of like somebody taking your lawn mower and saying, I didn't  
2 steal your lawn mower. But if I did, it was broken when I  
3 stole it; and even if I did steal it, it's not worth that much  
4 money to begin with. Those kinds of positions call into  
5 question the credibility of the people taking them.

6 Now, as Judge Gilstrap just instructed you and you're  
7 going to have that instruction in your binder when you go back  
8 in to deliberations, that you, the jurors, are the sole judges  
9 of the credibility of all the witnesses and the weight and the  
10 effect of all of the evidence. And I think that we can all  
11 agree that taking one position out in the world and then  
12 taking a different position in the courtroom after you've been  
13 sued is not a fair position, and we saw that happen time and  
14 time again this week from PNC.

15 For example, you heard Mr. Trebilcock, PNC's vice  
16 president, he was asked if he had seen USAA's mobile app. And  
17 he said on more than one occasion, I would confirm again I did  
18 not see the app.

19 What did we find when we got access to PNC's internal  
20 records? We found this email from Mr. Trebilcock to Mr.  
21 Thomas Kunz talking about the USAA app, and the first line in  
22 that email said, I've seen the app, I've seen the USAA app.  
23 And Mr. Trebilcock was directly involved in PNC's subsequent  
24 decision to launch its own MRDC product.

25 Credibility, ladies and gentlemen.



1           You've heard PNC's counsel state in opening statements  
2           that PNC didn't believe that it infringed then or now.

3           But what did you hear from their witnesses? You heard  
4           testimony from four of them. Ms. Larrimer was asked, have you  
5           done anything at all to investigate whether there is merit to  
6           USAA's claims. Her response was, I have not.

7           Mr. Goodstein was asked, did anyone at PNC do anything  
8           whatsoever to investigate whether it was using the  
9           intellectual property of USAA? His response, I do not know of  
10          anyone.

11          Mr. Trebilcock, do you know if anyone at PNC did anything  
12          to see if PNC was clear to offer mobile deposit without  
13          infringing patents? His response, I don't recall.

14          Mr. Kunz, did you take any steps to try to avoid  
15          infringing upon the USAA patents? I did not.

16          Does that sound like to you like they believed that they  
17          did not infringe?

18          Judge Gilstrap has also instructed you that you may  
19          consider -- in weighing the testimony of the witnesses, you  
20          may consider a witness' manner and demeanor on the witness  
21          stand.

22          I would like you the consider what did PNC's infringement  
23          expert Doctor Bovik's demeanor suggest to you? You recall  
24          that when Mr. Lantier was asking him questions on direct  
25          examination and on redirect examination, he was able to

1 provide smooth, well-rehearsed answers. But on  
2 cross-examination, he refused to answer any questions  
3 directly, and he dragged out every response.

4 Now, I'm betting you're not going to hear a whole lot  
5 about Doctor Bovik's testimony when PNC stands up here to  
6 argue today. But I will say that when he finally answered  
7 questions about infringement, he admitted that every single  
8 one of the monitoring criteria listed in the '571 Patent were  
9 present in PNC's system software.

10 Ladies and gentlemen, what did you hear about damages?  
11 Well, Mr. Kunz was asked, why did PNC decide to offer a remote  
12 mobile deposit application? His response, it's a convenience  
13 for our customers. That's all. It's just a convenience.

14 Ladies and gentlemen, you saw exhibits, and one of those  
15 you'll have a chance to pull back up in your deliberations,  
16 it's Plaintiff's Exhibit No. 43, and that is a shareholder  
17 statement that Mr. Bill Demchak gave publicly to his  
18 investors. He is the PNC chief executive officer. And he  
19 told the folks, his inventors, that PNC saved \$3.88 every time  
20 a customer deposited a check by mobile deposit versus a  
21 deposit with a bank teller.

22 And what did Ms. Larrimer, PNC's corporate rep, say about  
23 that testimony? She said that when he presented that \$3.88  
24 figure, he was being truthful. And she went on to say, he's  
25 always truthful.

1 Now, recall Mr. Demchak was not -- he was not telling his  
2 investors that this was a convenience. He was telling them,  
3 and I'm sure they were very glad to hear this, that this was a  
4 huge savings for the bank. And it was a huge savings because,  
5 as you will recall, there have been 105.8 million mobile  
6 deposit transactions during the damages period. And it wasn't  
7 just about channel costs, the savings from shifting deposits  
8 from tellers to mobile service; it was also about the branch  
9 cost savings that Mr. Kennedy spoke with you about a few days  
10 ago.

11 As Jim Rohr, the former PNC CEO, said, by migrating  
12 routine service transactions to other channels, and, and,  
13 optimizing the number of branches, we expect savings in the  
14 hundreds of millions of dollars. This is not just a  
15 convenience for their customers.

16 Mr. Stone also suggested to you in his opening statement  
17 that PNC didn't know anything about these patents, but we know  
18 from the evidence you've heard, and you'll see this at PX 196,  
19 PX 195, PX 197 and 198, that our patents were listed so that  
20 anyone who went to the app could see them. As you'll see in  
21 that highlighted spot, USAA's Deposit@Mobile may be covered by  
22 one or more of the following patents, and you'll see '571,  
23 you'll see the '681, you'll see the '605. And we know that  
24 PNC was looking at our app.

25 You'll also recall, you heard testimony from Mr. Tom

1 Kunz, senior vice president, that he learned about USAA's  
2 mobile remote deposit patents back in 2017. Did they reach  
3 out to USAA before using our property? No.

4 PNC even tried to make it sound like USAA was in the  
5 wrong for not telling PNC sooner that you can't use somebody  
6 else's property. You'll recall, though, testimony from Mr.  
7 Wilkinson, who gave consistent testimony on direct and  
8 redirect and I'll leave it to you to judge his credibility, I  
9 think he was a very credible witness, he testified that they  
10 sent a letter to PNC right after the lawsuit asking PNC to  
11 take a license, and PNC declined. Credibility, ladies and  
12 gentlemen. Credibility is crucial, and PNC has lost a great  
13 deal of it over the last five days.

14 Mr. Sheasby is going to finish our closing arguments.  
15 But before I sit down, I want to just say thank you again for  
16 your service this week. We appreciate it, and we look forward  
17 to your verdict.

18 MR. SHEASBY: Good morning, ladies and gentlemen of  
19 the jury. Like Mr. Bunt, I want to thank you for your  
20 sacrifice. I know it's time, it's exhaustion, and I know it  
21 has financial consequences, but I hope you can understand how  
22 incredibly important this case is to USAA.

23 Mr. Huynh, can we have slide 18, please?

24 USAA serves our military. We are owned by military  
25 members, retired military members, and their family. We spent

1 significant resources to create a technology that has  
2 transformed our business and has transformed commercial  
3 banking. In 2006, we launched a commercial platform that  
4 could accept the type of devices our members had at the time,  
5 the type of devices our members would following have.

6 And I'm going to show you a lot of exhibits. And in that  
7 blue left-hand corner is a PX number. And you can actually  
8 ask for that PX number from Judge Gilstrap when you're in  
9 deliberations. And so I'm putting the PX number in blue for a  
10 very particular reason--so you can see that what I'm saying is  
11 in evidence.

12 And Mr. Wilkinson spoke about the fact that the system  
13 from the beginning had the capability to handle the type of  
14 devices its members would have, its members would have and  
15 then have later on. He spoke about the fact that scanners,  
16 digital cameras, smartphones, all of them had the capability  
17 to be used in our system because they had the fundamental  
18 property of JPEG, which we built in our system from the  
19 beginning.

20 PNC, outside of this litigation, acknowledged that our  
21 designs were great ideas, and they said, we want it; USAA does  
22 it again. There's almost a sense of jealousy in what they're  
23 saying, that this creation with our members' money they took.

24 And this is PX 150.

25 Outside of this litigation, they internally and secretly

1     rave about our technology. They call us the industry leader  
2     in mobile applications, the first to launch mobile deposit.  
3     And in this case they say that Chuck Oakes and Bharat Prasad  
4     and Chris Wilkinson had no idea what they're doing, couldn't  
5     create anything of value, and what they did was worthless.

6             The first issue you'll be asked to decide is  
7     infringement. Infringement is based on the preponderance of  
8     evidence, which means if one pebble, one pebble is in favor of  
9     USAA, we prevail. That is Judge Gilstrap's instructions, and  
10    we are obligated to follow Judge Gilstrap's instructions.

11            Professor Thomas Conte. And I'd like Professor Conte to  
12    stand now. He did a detailed analysis and concluded that  
13    every single claim of the asserted patents were infringed.

14            Thank you, Professor Conte.

15            The infringement can be both literal and under the  
16    doctrine of equivalents, which means if there are even  
17    insubstantial differences between PNC's system and our claims,  
18    it's irrelevant. They still are liable under the law. If  
19    they do something equivalent or only insubstantially  
20    different, they are still liable under the law. That is Judge  
21    Gilstrap's instructions.

22            The examination of Professor Bovik was very, very  
23    difficult, but ultimately what we established is a concession  
24    that he was not meaningfully disputing infringement. He  
25    conceded that every single element of the claims of the '571

1 Patent were present in PNC's design. These are his words  
2 admitting it under oath.

3 As to the '432 Patent, he conceded every single  
4 limitation except in the beginning he disputed whether PNC  
5 checks for errors. After a very difficult cross-examination,  
6 he admitted under oath, based on PNC's own documents, PX 0303,  
7 that PNC does check for errors.

8 The '681 and '605 Patent, he presented an argument in  
9 which he said that the PNC system doesn't present pictures  
10 after they're taken. One of the most powerful tools you have  
11 is common sense. Professor Conte showed you the source code  
12 and the source code definitively establishes that the front  
13 and back of the check are presented to the user after they are  
14 captured.

15 PNC also had an argument in which they tried to avoid  
16 responsibility for their conduct and said their customers are  
17 responsible for this conduct. That is not the law; it's an  
18 irresponsible argument. Judge Gilstrap has made clear that if  
19 PNC exercises direction or control over the users' devices,  
20 they are responsible. And, of course, they exercise direction  
21 and control. As Mr. Prasad explained, the design of the  
22 downloaded application allows you to control the phone and  
23 control the deposit process.

24 And Doctor Bovik also admitted under oath that PNC builds  
25 a system.

1 Can we go to slide 34, please, Mr. Huynh?

2 The next issue I would like to discuss with you is  
3 validity. PNC has the sole burden to prove by clear and  
4 convincing evidence that every single claim that has been  
5 asserted against them is invalid. And clear and convincing  
6 evidence is substantially greater evidence than the evidence  
7 that we must show to prove infringement.

8 There is a presumption of validity that extends to our  
9 patents because of their careful examination by the Patent  
10 Office. Invalidity must be determined on a claim-by-claim  
11 basis. Professor Kia showed you one claim in his analysis of  
12 validity. He ignored Judge Gilstrap's instructions, he did  
13 not perform a claim-by-claim analysis, and PNC's counsel will  
14 also not perform a claim-by-claim analysis as Judge Gilstrap  
15 requires them to do so.

16 This distraction as to when we launched our commercial  
17 iPhone app, which you heard so much about in opening and which  
18 they talked to Mr. Prasad about at length, is irrelevant to  
19 the question of validity. Judge Gilstrap's instructions make  
20 this absolutely clear. There is no requirement of actual  
21 reduction to practice of the claimed invention. The patent  
22 law does not require you to build your invention and launch it  
23 commercially. Any suggestion to the contrary was a gigantic  
24 distraction designed to confuse the clear liability of PNC.

25 The criticism that Mr. Oakes, who is not here anymore,



1 and Mr. Prasad, and Mr. Wilkinson were incompetent and  
2 couldn't get things to work, is unjust and inaccurate. USAA  
3 treats its obligations to its members seriously, and it  
4 doesn't release products until they meet the lofty standards  
5 of USAA. That is not the standard for enablement or written  
6 description. You will see no reference to commercial products  
7 or commercial success or commercial standards in Judge  
8 Gilstrap's instructions.

9 THE COURT: 20 minutes have been used.

10 MR. SHEASBY: The Patent Office approved each of our  
11 claims.

12 PNC's expert, Doctor Kia, admitted he did not follow the  
13 rules, but he did admit something very important. He conceded  
14 on cross-examination that the presence or absence of a  
15 commercial embodiment is irrelevant, irrelevant to validity.  
16 No physical product is necessary for validity. He conceded it  
17 under oath.

18 And he conceded that in 2006, he could have built our  
19 system even though he had never built a mobile remote deposit  
20 capture. And if you remember, he resisted mightily conceding  
21 this, even though he had said it under oath at his deposition.  
22 But he was ultimately required to admit it.

23 Mr. Oakes spoke about the fact that what the patents are  
24 are blueprints. And if you look at the patents, you will see  
25 the detailed blueprints that are present in them.

1 Mr. Prasad spoke about the fact that there is detailed  
2 descriptions of how to use digital cameras. If you go to PX 3  
3 at column 7, lines 50 through 65, and the columns are the left  
4 and right-hand side of the page, you can see the little  
5 numbers, you can look for yourself and see the detailed  
6 instructions about digital cameras.

7 Every single design that we list in our patent, PNC has  
8 present in its product. They say our system could not work or  
9 they couldn't know how to use our system from our patents.  
10 The exact design in our patent we found in PNC's system. They  
11 said there's no disclosure of mobile devices. Mobile phones  
12 are not required. There's no disclosure of handheld devices  
13 in our patent.

14 Doctor Kia was forced to admit under oath that if you go  
15 to figure 3 of the '605 Patent, you will find a detailed  
16 description of what he admits is a handheld self-contained  
17 device with its own processor. It's in the patents.

18 Mr. Prasad spoke about the fact that they expressly wrote  
19 into the patents the use of PDAs. You can find this at PX 2,  
20 which is the '605 Patent, at 8, 27 through 54.

21 The next issue I want to discuss with you is willful  
22 infringement. When you think about the extraordinary  
23 standards that we are held to as citizens of this country in  
24 terms of when there's even minor violations, the strict  
25 consequences we face. This is not a minor violation. We

1 filed our patent applications, we publicly announced their  
2 existence, they were publicly -- the first of our family was  
3 granted in January of '21 before PNC lost its original system.  
4 We are only seeking damages from 2016 forward.

5 2016 is when we marked our patents. PNC's response to  
6 this is to suggest, oh, well it's not our fault; we didn't  
7 know about the patents before you sued us. In 2017, they  
8 admitted under oath they knew about the patents.

9 In addition, they try to blame vendors. Oh, we just  
10 bought something off the shelf; it's not our fault. But they  
11 admit that in 2016 and '17 when we started seeking damages in  
12 this case, they built their own system, and they did nothing  
13 to investigate whether there was infringement.

14 Let's go to slide 59.

15 This version 4.20.1 is a gigantic distraction. It is  
16 nothing to do with liability in this case. It will not be  
17 part of the damages in this case. They try to use it to  
18 suggest that, oh, our patented technology was not very  
19 valuable because we could have done something else. But to be  
20 able to make that argument, they must show that that something  
21 else doesn't infringe our other patents.

22 There are three patents that Professor Conte presented to  
23 you, ladies and gentlemen of the jury, and that stated  
24 expressly that PNC does not avoid infringement by these  
25 patents. He said it and he concluded it. And you can look at

1 those patents and you can look at the claims.

2 Doctor Bovik conceded it as well. He is not stating that  
3 those patents are non-infringing alternatives. They are  
4 covered by our other patents.

5 A lot of families that are big have two cars. If a  
6 criminal breaks into one of your cars and you bring process  
7 against them, the argument that that criminal could have  
8 broken into another one of your cars and therefore they should  
9 not be liable is absurd.

10 Both of these properties are ours. The 4.20.1 is covered  
11 by our other property. They cannot escape our technology.  
12 They need our technology.

13 And the last issue I want to talk about is damages. They  
14 give us a story in which they say, oh, we would never have  
15 used your technology if you would have just come to us in  
16 2016. They've made over \$600 million from mobile remote  
17 deposit capture. They've generated billions and billions of  
18 dollars in deposits. And as part of the hypothetical  
19 negotiation, they get to keep \$30 million of the money they  
20 made by infringing our patents.

21 Ladies and gentlemen, I will have one opportunity to  
22 speak with you again. I appreciate and thank you for your  
23 patience.

24 THE COURT: Defendant may now present its closing  
25 argument to the jury.

1 MS. SMITH: May it please the Court, Your Honor.

2 THE COURT: Would you like a warning on your time,  
3 Ms. Smith?

4 MS. SMITH: No, thank you, Your Honor.

5 THE COURT: Please proceed.

6 MS. SMITH: Thank you.

7 Now, ladies and gentlemen, good morning. I am going to  
8 join Mr. Bunt and Mr. Sheasby as well as the Court in thanking  
9 you for your sacrifice. I know, quite frankly, when we all  
10 came together on Monday, some of you were sitting out there  
11 hoping that your number wasn't called probably. But it's  
12 been -- and I can't lie, it's been a long week, but we  
13 appreciate your attention and we appreciate your long days.

14 On behalf of myself, Mr. Stone, Mr. Lantier, and PNC, all  
15 the folks at PNC, along with Ms. Larrimer, we appreciate your  
16 time.

17 Now, Mr. Stone is going to take the lion's share of the  
18 Defendant's close this morning, but some of you have seen me  
19 sitting at the table taking notes, and I was the first person  
20 that spoke with you on Monday. So I thought it would be  
21 appropriate for me to take just a precious few minutes and  
22 review some of what we've heard this week.

23 Now, you've probably noticed that the parties, we haven't  
24 agreed upon much in this case. I take issue that they're  
25 asking that USAA is asking for \$300 million and that that in

1 any way compares to something we'd see on a playground. But  
2 we do agree on this: We do agree that this case comes down to  
3 credibility.

4 Now, I wrote this down. Mr. Sheasby said in his opening  
5 statement, he said, PNC's executives, they made a fatal--his  
6 word--fatal decision, they decided to take what USAA had  
7 created so they could compete with USAA. We all heard that.  
8 So what I'm going to do for a few minutes is I'm going to test  
9 that with you. I'm going to compare that to the actual  
10 evidence we've heard in this courtroom.

11 Ladies and gentlemen, PNC took you back over a decade,  
12 years before USAA's patents ever issued. We saw technology  
13 changing, we saw apps coming out in all different parts of the  
14 society, including banking. Banks were coming up with new  
15 ways to serve their customers, big banks, small banks alike.  
16 And customers began depositing their checks on their mobile  
17 phones across many, many banks.

18 PNC was no different. We heard that PNC launched a  
19 mobile app back in 2011. And let's keep in mind, that's four  
20 years before the first USAA patent issued. It was an app to  
21 serve its customers. PNC offered that app for 10 years. They  
22 offered it for a decade.

23 But I think when we're talking about credibility, it's  
24 important to look at what those folks at USAA were doing  
25 around that time. They were watching the industry. We heard

1 from Mr. Wilkinson on the stand that USAA was monitoring its  
2 competitors, that it monitored PNC specifically. Mr.  
3 Wilkinson didn't want to use my words. He wanted to call it  
4 benchmarking, but we all know what that meant.

5 Now, those USAA patents, they eventually issued, but only  
6 after PNC customers had been depositing checks on their phone  
7 with the PNC app for every day, every month, and every year  
8 for four years.

9 So let's take a look at credibility and what the folks at  
10 USAA did when they got their patents. Did they come to PNC?  
11 No. Did they send a letter? No. No phone call. What did  
12 they do? They kept watching. They kept waiting and watching.

13 So what else was USAA doing other than watching PNC and  
14 the others? Well, Mr. Sheasby told us a little bit about  
15 this. He said, oh, my goodness, there was significant press  
16 coverage about USAA, articles were written about our  
17 groundbreaking technology.

18 Well, we know a little bit more about that from Mr.  
19 Wilkinson, don't we? We heard from Mr. Wilkinson and USAA's  
20 own documents that every one of those articles, every one of  
21 those articles that Mr. Sheasby showed you, was part of USAA's  
22 strategic plan--their word--to pitch the media. I asked Mr.  
23 Wilkinson, and he agreed you got to consider the source. You  
24 got to consider the source when these articles are being  
25 paraded around.

1           And we now know that the big news, the news about their  
2           technology was a strategic communication plan, a plan hatched  
3           by a branch of USAA called the CLO. And Mr. Wilkinson  
4           clarified that for us, that's their lawyers. It stood for the  
5           chief legal office.

6           So we go on down the road, and PNC saw the news. They  
7           didn't know the lawyers were pitching it, but they saw the  
8           news, they saw the article, and we heard a lot about this  
9           article. It was from the American Banker. And PNC learned  
10          from that article that USAA was going around to banks and  
11          reaching out and asking banks to license its technology. Was  
12          PNC one of them? No. We've heard no evidence that USAA  
13          approached PNC.

14          So I'd submit that PNC did what was reasonable, what's  
15          believable. They did what you might expect. They went to the  
16          company that made their app, and that company was called NCR.  
17          And, you know, I saw something that Mr. Bunt put -- put  
18          another slide of four of the PNC bankers on the screen, and  
19          they took a little criticism. Remember Ms. Larrimer took the  
20          stand and, you know, she was accused of not knowing anything  
21          about patents and she was made to kind of read patents on the  
22          fly. She's a banker.

23          What PNC did is they wrote a letter to the off-the-shelf  
24          company that they bought their software from. And what did  
25          NCR say? They said, we stand behind our product; there's no



1 problem with USAA.

2 So we fast forward to September of 2020, and USAA files  
3 its suit. And, again, let's keep this in perspective.  
4 September of 2020 is after PNC had been openly, openly and  
5 publicly offering its mobile app to its customer for nine  
6 years, five years after USAA's patents issued.

7 Now, ladies and gentlemen, I would suggest to you that  
8 the best test of credibility as to PNC, it's what happens  
9 next. So PNC begins to investigate. PNC tries to understand  
10 what's being accused and what's being claimed. And as I said,  
11 we didn't do that with bankers, we hired experts, they hired  
12 lawyers, we certainly didn't task bankers with doing a patent  
13 or legal investigation.

14 But at the same time, the folks at PNC determined that  
15 they wanted to avoid this dispute altogether, so how did they  
16 do that? They disabled and they removed the two features that  
17 were accused. They took out the features that USAA was  
18 accusing; took them out. And that came at a cost. It wasn't  
19 an easy decision. It came at a cost, a cost of over \$10  
20 million, I believe is the testimony you heard.

21 So let's go back to credibility. Let's go back to Mr.  
22 Bunt's comments about credibility again.

23 USAA makes the allegations, and PNC takes out the accused  
24 features. What's PNC's reward? What's USAA do next? Well,  
25 this is, quite frankly, ladies and gentlemen, where it gets

1 really interesting because things begin to change in about day  
2 two of this trial.

3 So what we heard and what we heard from the Court is that  
4 this case is about four patents, and you just heard the Court  
5 give you instructions about four patents. But when we started  
6 sharing with you-all, the jury, that we'd taken out was  
7 accused in those four patents, well, what happened next?

8 Well, the Plaintiff said, well, if you didn't infringe  
9 literally, there's this thing about -- called DOE, and we got  
10 close enough. But if you didn't infringe these patents  
11 literally and -- and we didn't get close enough, you know,  
12 we've got this stack of a hundred other patents. They were  
13 real proud of that big stack of patents. We've got this stack  
14 of a hundred other patents and we're going to pluck three out  
15 and you infringe those.

16 So we begin again. These three were a little bit  
17 different because USAA didn't tell you what those patents were  
18 about, they didn't tell you what PNC supposedly did wrong.  
19 They just pulled three patents out of the stack and said --  
20 put them on a slide and said they infringe and nothing more.

21 The case is about believability, as Mr. Bunt told you.

22 So Mr. Stone's going to visit with you in a minute, but I  
23 want to talk about USAA. We've heard a lot about their early  
24 beginnings, and I respect that story. I have military in my  
25 family. I respect that story. You heard they were formed

1 back in 1922. You heard 25 men, generals, came together to  
2 form an insurance company.

3 But you've got to wonder, I mean, you've got to wonder if  
4 this is what they had in mind. Is this what they had in mind?  
5 Do you think honorable men like that in a million years  
6 envisioned a time where USAA would go from insurance to  
7 banking, and they'd go from competing in the marketplace to  
8 pulling those patents off of that stack and competing in the  
9 courthouse? I'd submit no.

10 Thank you, Your Honor.

11 Mr. Stone?

12 THE COURT: Mr. Stone, would you like a warning on  
13 your time?

14 MR. STONE: At seven minutes, please, if I might,  
15 Your Honor. Thank you.

16 THE COURT: I'll warn you when you have seven  
17 minutes remaining. Please proceed.

18 MR. STONE: Good morning, ladies and gentlemen, and  
19 let me join with the others in thanking you for your time. It  
20 has been a big commitment on your part, and we very much  
21 appreciate it.

22 I want to start by reminding you of something I said in  
23 my opening, if I might. I said you would hear from USAA  
24 talking about all there is to do in a mobile remote deposit  
25 capture system. They would use the phrase MRDC again and

1 again.

2 And I asked you, if you would, to, please, every time,  
3 stop and ask yourself, but this is not about remote deposit;  
4 it's about two features and four patents. And those two  
5 features are linked to the four patents because we know, once  
6 you take those features out, those four patents are not  
7 infringed.

8 And this is a case, you heard it in Judge Gilstrap's  
9 instructions, where we have to decide, did these two features,  
10 when they were in the app, the original app, did they  
11 infringe? And we have to ask ourselves, what were they worth?  
12 If we get that far and you find the infringement, what were  
13 these two features worth, not what is all of remote deposit  
14 worth. PNC is still doing remote deposit. Every benefit its  
15 customers receive, every bit of benefit the bank receives,  
16 it's still receiving. Deposits continue with 4.20.1, and  
17 4.20.1 does not infringe the patents in this case.

18 Let's talk for just a minute about infringement and why  
19 it doesn't infringe and why the original app does not  
20 infringe.

21 Now, the original app had in it the feature where you  
22 take the photo, take the photo, show the photo, and show to  
23 photo. And the original app in 2016 added the feature of  
24 auto-capture. Remember, for five years PNC didn't have  
25 auto-capture, but it added the feature in 2016. So the two

1 features that were taken out when PNC were sued, they were  
2 there in that original app from the time that USAA actually  
3 marked its patents in accordance with the law. And I'm going  
4 to come back to that. But those features were there.

5 So why did PNC not infringe? Well, if we remember the  
6 example I gave you, you have to satisfy each and every element  
7 of a claim. If you talk about sports equipment that is made  
8 of leather, it wouldn't just be a soccer ball and a football.  
9 You could throw a baseball in there and a saddle, too. And if  
10 you said stitched together, well, you still have a baseball  
11 and you still have a saddle.

12 Now, if you said filled with compressed air, getting to  
13 the third element, the saddle and the baseball go away. And  
14 it's only when we get to round and not oblong that we realize  
15 that every element you add narrows the claims, and a football  
16 is no longer covered by the same patent that would apply to a  
17 soccer ball.

18 Now, why does that matter here? Because here there are a  
19 lot of elements in each of the claims. Mr. Sheasby was  
20 showing you yesterday, when he was examining Doctor Vellturo,  
21 he was showing you how long the claims are and how many  
22 elements they have. Well, each of the claims, as Doctor Bovik  
23 went through, each of the claims of the patents asserted in  
24 this case have an element, have a requirement, that is not  
25 found in PNC's product.

1           For example, we talked about this morning, we heard about  
2           checking for errors. Where does the checking for errors  
3           occur? Where does the computer look at what has been  
4           submitted and decide whether it can accept it or there's an  
5           error and it has to be redone? It's at a big computer system  
6           in Greenfield, Virginia.

7           Now, the consumer, the user has to be told that. PNC's  
8           customers get a message from those computers on their phone  
9           that tells them there's an error, a message which is exactly  
10          what was on the slide Mr. Sheasby put up. A message back is  
11          not checking for errors any more than when I'm driving home  
12          after the end of a day of working, I call my wife to check to  
13          see whether I should pick something up at the store, and she  
14          either tells me yes or no. I get the message back, but the  
15          checking occurs wherever she is at the time.

16          So that element of the '432 Patent is not satisfied.

17          Now, both of the '681 and '605 Patents require the photos  
18          be taken and then shown. But PNC's patent was different. And  
19          this applies to each and every one of the asserted claims.  
20          The patent is different. What's that mean? It means the  
21          lawyers for USAA, when they were drafting these claims and  
22          writing out their details, chose one way to try to get a claim  
23          from the Patent Office, and those words matter, and those  
24          limitations matter.

25          And then there's another limitation that cuts across all

1 of these patents, all of the patents filed in 2006, as well as  
2 the '571 Patent. They require that there be the use of a  
3 mobile phone. And I'm going to come to the instructions on  
4 this in a moment. They require there to be the use of a  
5 mobile phone. PNC doesn't provide mobile phones to its  
6 customers. It's not PNC's phones that are used. It's phones  
7 that the customers have purchased, whether they purchased them  
8 at the Verizon store or the AT&T store or Sprint or some place  
9 else. It's the customer's phone, and that means it's the  
10 customer who decides do I want to download the app, do I want  
11 to remotely deposit my check.

12 And for purposes of the '571 Patent, most importantly,  
13 who decides if I want to take manual capture or auto-capture?  
14 Because the '571 Patent is the auto-capture patent. And you  
15 see here in the instructions, you see in the last sentence of  
16 the instructions, components provided by another party, that's  
17 the customer, are attributable to PNC if you find that PNC  
18 exercised direction or control over that other party.

19 So what's that mean? Did PNC tell its customer, you have  
20 to do manual capture, you have to do auto-capture? No. The  
21 customer decided. It's the customer who had control. PNC  
22 gave them the option; customer made the choice. That's the  
23 law in your instructions that you will have with you in the  
24 jury room.

25 Well, what does that mean? It means that the original

1 app that PNC released was not infringing any of these four  
2 patents.

3 Now, here's the letter or here's the news article in the  
4 American Banker that Ms. Smith talked to you about, and she  
5 talked to you about the contact between PNC and its vendor,  
6 NCR. And here's the instruction that you're going -- the  
7 verdict form, the question that you're going to be asked: Did  
8 PNC willfully infringe?

9 They didn't have any reason to think they had a problem  
10 because they knew as a result of that American Banker article  
11 that USAA was contacting banks, lots of banks that it thought  
12 infringed. PNC wasn't contacted. It's vendor said, you don't  
13 have an issue.

14 And so what -- where does USAA go then? They say, well,  
15 when they were developing their app way back in 2011, they  
16 took a screenshot of what was on the internet and what you  
17 could get by looking at their website. They took a screenshot  
18 of our interface, and they copied it. They didn't show you  
19 anything in PNC's app that you could have copied from that  
20 picture. It's a picture of the interface. It had their logo  
21 on it. They -- you can look at that document. There is  
22 nothing in there. That document that you were shown by Mr.  
23 Sheasby, you can look at. There's nothing in there that is  
24 source code. There is nothing in there that tells you how to  
25 make it work. There is nothing in there that goes through the



1 list of how things work. And they didn't even have any of the  
2 four patents in this case at the time.

3 Sometimes I think about the question of willful, do I  
4 intentionally or willfully go out and do something, do I  
5 intend to take something. At that point in time, they didn't  
6 even have these patents. At that point in time, PNC was  
7 developing its own app, its own way, and it couldn't have  
8 taken anything from that photograph that's on that document,  
9 which they blow, frankly, way out of proportion.

10 They had every reason to think USAA was not going to  
11 watch and wait, watch and wait. They had reason to expect if  
12 USAA thought, while it was watching PNC, that it saw PNC do  
13 something wrong, they would come say something.

14 I mean, you were asked about drilling rigs on your land,  
15 and if somebody puts a drilling rig on your land, would you  
16 just sit there and watch and wait, and watch and wait? Or  
17 would you get up, go out of your house, walk over to where  
18 they are, and say, this is my land, you should please take  
19 your drilling rig off. But they didn't do that. They didn't  
20 act the way you would expect somebody to act, the way we have  
21 every reason to expect other people to treat us. There was no  
22 willful infringement.

23 We do have this issue. It comes back in funny ways,  
24 because we began to hear in the course of this case, well, we  
25 think 4.20.1 is maybe not a non-infringing alternative. Well,

1 the instructions that you have been given are quite clear. It  
2 was the burden of USAA to come prove that 4.20.1 infringes one  
3 of the patents in this case. Their burden, their burden.

4 And what did we see? Well, we saw from Doctor Conte that  
5 he said, I am not offering any opinion, no opinion, that  
6 4.20.1 infringed any of those three patents. In fact, it is  
7 uncontested in this case that the '432, the '681, and the '605  
8 are not infringed because the feature of showing the photo to  
9 the customer before it is submitted to the bank has been taken  
10 out.

11 Now, what about that auto-capture feature? Well, as to  
12 the auto-capture feature, what do we hear from USAA? Well,  
13 the code is still there. They don't dispute that a customer  
14 can't see the feature on their phone. They don't dispute that  
15 a customer can't use the feature on their phone. They don't  
16 dispute that the customer has any way to access the feature on  
17 their phone.

18 Doctor Conte was pretty clear about that. In fact, he  
19 said in the default configuration, there's no infringement  
20 either, in his view. But USAA's lawyers have pushed harder.  
21 They say, you shouldn't still have that software somewhere on  
22 a computer. Well, that software is in the world every place.  
23 Would it make any difference in the world if you take the  
24 software out of that computer and go put it on another  
25 computer or just throw it away? It's every place as we know

1 about so many things today.

2 It is not available to PNC's customers, and that's what  
3 matters. And you've heard from Doctor Bovik and you see  
4 Doctor Conte has no opinion on it, but there's no infringement  
5 with respect to auto-capture, either. It's not available. It  
6 can't be used.

7 There's another issue, and Ms. Smith talked about it.  
8 They came in and they started putting up on slides three other  
9 patents. They showed you the cover page of the three patents.  
10 They showed you ribbons on those patents. And they said,  
11 well, we have three other patents from our pile that PNC  
12 infringes. But we know what they have to prove to prove  
13 infringement, and we know the burden of proving infringement  
14 is on them. It's page 19 of your instructions. They have  
15 this burden. They have to prove there's infringement of  
16 anything they say is not a non-infringing alternative.

17 We know how Doctor Conte proves infringement. He puts up  
18 on the screen a chart like the one I've shown you where he  
19 goes element by element, A through G or H, however many  
20 elements, he has all those letters, and then he has a  
21 description of what he thinks the element or limitation is,  
22 and then he either puts a checkmark or an X..

23 He didn't show you a single chart for these three new  
24 patents they pulled from the pile. No charts, no proof, no  
25 evidence, no infringement of these other patents.

1           That takes me to something I talked about with you in the  
2 opening, which is what did PNC's lawyers learn and its experts  
3 learn after this case was filed and it began to prepare its  
4 defense, because you understand what happens in the lawsuit.

5           You start to take discovery. You start to dig into  
6 things. You look at documents that USAA has in its files,  
7 documents you've never seen before, documents that no one had  
8 ever seen before. You begin to look at those documents. You  
9 begin to see emails and internal presentations, and you  
10 ultimately have the opportunity to take depositions of  
11 witnesses and see what they will tell you when they're under  
12 oath.

13           And what did PNC learn? It learned that the enablement  
14 requirement hadn't been satisfied. Now, why does that matter?  
15 Why does the enablement requirement matter? Because we want  
16 as a country and as we recognized in our Constitution, we want  
17 to get patents to inventors for inventions, things that they  
18 actually can make and use. And we want them to describe it to  
19 all of us in that patent how we could make it and use it.  
20 That's the bargain between the government and us on the one  
21 side and somebody who files for a patent on the other.

22           You can't rush in and get a patent on something you don't  
23 know how to make it work because that's not fair to everybody  
24 else who is trying to make the same thing work as well,  
25 because lots of people are trying to make inventions and lots

1 of people were trying to make ways to deposit checks remotely  
2 after the law changed and Check 21 came into effect. Because  
3 now all of a sudden you can use the image of a check instead  
4 of a real check. And that was an opportunity the change in  
5 the law gave to a lot of people. Companies were working on  
6 that. A fair race to see who can get there first is a race  
7 where once you have one that will work--okay?--go file your  
8 patent.

9 And Doctor Kia was asked about this. Doctor Kia was  
10 asked and Mr. Sheasby was making the point with Doctor Kia  
11 sometimes it takes a long time to make something work. Doctor  
12 Kia said, yes, in his experience it had taken him years  
13 sometimes to make something work.

14 And then I asked Doctor Kia, well, did you ever file for  
15 a patent on any of the inventions you made before you knew how  
16 to make it work, before you could describe to others how to  
17 make it work? And Doctor Kia said, no, I never did that. It  
18 took me a long time, but I waited until it was proper for me  
19 to file a patent application.

20 USAA was in that race. They were in that race to get to  
21 the Patent Office, and they ran there before they knew how to  
22 make it work. And we know that because, well, here's the law.  
23 The law says -- this is in your instructions. The law says,  
24 if a claim is not enabled, it is invalid. That's the last  
25 line. And before that, it says, you have to be able to teach

1 persons of ordinary skill in the field, not persons of  
2 extraordinary skill in the field like Doctor Bovik or Doctor  
3 Kia, but you have to teach persons of ordinary skill when you  
4 file your patent application how to make and use the full  
5 scope of the claimed invention without undue experimentation.

6 And the full scope here is not we knew how to make it  
7 work with scanners. Right? They knew how to make it work  
8 with scanners. None of us doubt that. The full scope is,  
9 because this is what they later claimed, did they know how to  
10 make it work with mobile phones and mobile devices. And the  
11 answer is no..

12 They filed these two patent applications on October 31st  
13 of 2006. Well, let's just go five days earlier to an email  
14 from the president of the bank, Michael Luby, and he says, we  
15 should figure out how to make it work. And there he's talking  
16 about digital cameras. And then he goes on to say, what about  
17 a phone? And you heard evidence in this case that they tested  
18 phones in early 2007 and they didn't work and they didn't know  
19 how to make them work.

20 And this document would be of interest to you, is DX  
21 1124, and you can ask for it.

22 And then later in May of 2007, they decided, let's do  
23 some research. And you heard from Mr. Prasad that he said,  
24 well, that was sort of commercial. That was a business  
25 document. But what we know is it was research they have to

1 do. You can call it any kind of research you want. This is  
2 something that they didn't yet know how to make it work.

3 And how do we know that? Because the words go with the  
4 testimony: We're going to research the viability to take  
5 check deposits via cellular camera phones. And viability  
6 means, is it possible? And that is what they did next. And  
7 they didn't, as we know, they didn't have a working prototype  
8 until September of 2008.

9 THE COURT: Seven minutes remaining.

10 MR. STONE: Thank you, Your Honor.

11 And with respect to the auto-capture, they didn't do  
12 their testing until 2012. Same problem. They filed their  
13 application in 2009. And as Mr. Bueche said, you saw his  
14 testimony, we didn't disclose in our applications the  
15 algorithms that we were using.

16 So with respect to the verdict form you're going to be  
17 asked about each of these claims. But Doctor Kia was  
18 quite clear about this: Each of these claims from the 2006  
19 applications for the '432 and '681 and '605 are all the same.  
20 None of them were enabled because nothing in the applications  
21 taught somebody how to make it work because at the time they  
22 filed USAA didn't know how to make it work.

23 And the same issue arises with the '571, or the  
24 auto-capture patent. They filed it as an idea, not as an  
25 invention, and they jumped the gun and got a head start on

1 everybody else out there trying to make inventions.

2 And with respect to written description, you also heard  
3 about that from Doctor Kia. He said, somebody reading the two  
4 applications in 2006 would not have known the claimed  
5 invention's for mobile phones or mobile devices because those  
6 words are not there as something you could use to take a check  
7 image that you then could deposit. And you heard them talk  
8 about things like these were paradigm shifts and it changed  
9 the whole ball game and so on.

10 So why did they race? Why were they in such a hurry to  
11 get there? What was going on at USAA that they decided that  
12 it was okay for them to get a head start on everybody else?  
13 Well, Mr. Kennedy gave us insight into that because he came in  
14 and said, well, we have a patent now that, if we sit on this  
15 patent and watch and wait, we will see PNC's customers make  
16 105,800,000 deposits and that's going to add up to a lot of  
17 money, no matter which way you cut it.

18 There is an issue about whether he used the right damages  
19 period, and that's the marking requirement that Judge Gilstrap  
20 has instructed you on and you have that requirement, they have  
21 to mark it. And they claim to have marked it by putting it on  
22 their website. But the first website document that we saw in  
23 this case was when we saw a real copy of a website, a  
24 screenshot or a print job, that was PX 926, and it was dated  
25 June 3rd of 2019.



1 Now, if you know, as USAA knew, that you have to mark if  
2 you want to recover damages, if you were marking and it was  
3 actually on your website, you would take a picture of it. You  
4 would have a screenshot or a printout of the website. You  
5 wouldn't just come in and say, as Mr. Wilkinson said, I don't  
6 know who was in charge of the website back then and I haven't  
7 talked to that person, but I've seen some internal code of  
8 ours that I think means we would have marked our website  
9 sooner.

10 Does that make sense? You know you have to mark. You  
11 know you have to be able to prove you marked. Would you not  
12 have evidence that all you have to do is push a button to  
13 print the screen? Would you not have that evidence? Why  
14 isn't that evidence here? You should look at the damages  
15 period Mr. Kennedy talked about and you should move it up to  
16 June 2019 because that's the earliest it possibly would have  
17 started.

18 But there's really more than that because, had they just  
19 come to PNC back in 2016 when they say it started, PNC would  
20 have done exactly what it did, exactly what Ms. Larrimer told  
21 you they would have done: They would have taken out those two  
22 features. Why wouldn't you, especially if you heard from  
23 USAA, if you don't take them out in 2020, we're going to sue  
24 you and in 2021 we are going to ask you for \$300 million?

25 We know how much auto-capture is worth. We can look at

1 the damages analysis that was done by Doctor Vellturo. But  
2 first we can even look at what the people at -- USAA'S  
3 customers were saying about their auto-capture: It's the  
4 worst feature I've ever used.

5 Okay. So what are these two features worth? Because  
6 these are the ones that matter. Well, there's a couple of  
7 ways to look at it, but if we step back for a minute, we know  
8 that today checks account for only 15 percent of the deposits,  
9 we know that only nine percent of the accounts at PNC use  
10 mobile deposit, checks are going out of vogue, things are  
11 changing, people are transferring money in other ways, checks  
12 are not as important as they used to be.

13 But more than that, we know what it costs to take out  
14 those features. You heard that from Doctor Vellturo. Take  
15 everything into account, employees, impact on the business,  
16 cost of the software programmers and engineers, \$10.5 million.  
17 We know that number.

18 We also know, and this is one of the factors for you to  
19 consider, we also know what others paid on a per-transaction  
20 basis. We know that PNC paid NCR 12 cents a transaction.

21 We know that Bremer, once you account for it having  
22 gotten a license to far more patents than are at issue here,  
23 we know, as Doctor Vellturo walked you through his analysis,  
24 that the Bremer agreement is really equal to 3 cents per  
25 deposit for the four patents here.

1           We know that there were offers made to SunCoast and  
2 Dollar by USAA at 6 cents.

3           And we know that Mr. Kennedy somehow thinks that, despite  
4 these other licenses, it's all the way up to \$3.07 a  
5 transaction.

6           THE COURT: Mr. Stone, your time has expired.

7           MR. STONE: Thank you very much, Your Honor. I  
8 appreciate it.

9           THE COURT: Mr. Sheasby, Plaintiff has 13 minutes  
10 and 17 seconds left. Would you like any warning on your final  
11 time?

12           MR. SHEASBY: I would, Your Honor. I would like a  
13 warning at seven minutes.

14           THE COURT: I'll warn you when you have seven  
15 minutes remaining.

16           MR. SHEASBY: And also one minute.

17           THE COURT: All right.

18           MR. STONE: Your Honor, on my clock I had myself at  
19 40 minutes, and I started right when Ms. Smith started. So I  
20 did have a different count on that.

21           THE COURT: I counted Ms. Smith's time against your  
22 40 minutes.

23           MR. STONE: No, so did I, Your Honor. Thank you.

24           THE COURT: All right. Mr. Sheasby, you may present  
25 Plaintiff's final closing.

1 MR. SHEASBY: Can we have slide 70, Mr. Huynh.

2 Credibility and common sense. Counsel for PNC just told  
3 you, for example, they don't infringe because there's no error  
4 checking on the mobile device. That is the exact opposite of  
5 what Doctor Bovik said under oath. The exact opposite.

6 Slide 73.

7 This childish argument that they do, take, show, take,  
8 show, as opposed to take, take, show, show, is completely  
9 contrary to the law of the doctrine of equivalents, and it  
10 also ignores the fact that our patent shows exactly what they  
11 concede they do--take, show, take, show. You can find it in  
12 the '605 Patent. Doctor Bovik resisted, but he ultimately had  
13 to admit it.

14 Can I have slide 76, please, Mr. Huynh?

15 PNC's attempt to blame its customers is improper as a  
16 matter of law. PNC controls the system. PNC's app is what  
17 controls whether the checks can be deposited.

18 Let's have slide 77.

19 Doctor Bovik admitted its PNC system.

20 Slide 76. 78, excuse me, Mr. Huynh.

21 Doctor Conte's testimony was undisputed that the system  
22 that PNC makes is a system that PNC controls. Doctor Bovik  
23 said nothing different. PNC is in control of its system.

24 Let's go to validity, slide 20.

25 We raced and we cheated the Patent Office is what you

1 just heard from PNC. Their internal documents say we are the  
2 leader and that we were the first.

3 I'd like Mr. Wilkinson and Mr. Prasad to stand up right  
4 now.

5 The suggestion that we cheated the Patent Office, that  
6 our system did not work, requires you to conclude that Mr.  
7 Wilkinson and Mr. Prasad and Chuck Oakes are liars.

8 Thank you.

9 Let's go to slide 96.

10 Chuck Oakes, who has passed, made clear in his original  
11 email the system had the capability to work with digital  
12 cameras.

13 Let's go to slide 97.

14 Bharat Prasad under oath showed you evidence that the  
15 system worked with digital cameras.

16 Let's go to slide 98.

17 Chris Wilkinson, non-commissioned officer in the United  
18 States Air Force and a 24-year veteran of USAA, told you the  
19 system worked. And they are asking you to conclude he's a  
20 liar.

21 Let's go to slide 82.

22 Commercial systems are not the requirement for  
23 enablement. Extensive experimentation occurs and that does  
24 not make a patent not enabled.

25 Let's go to slide 89.

1           This fiction that because we waited until our members  
2           could use and enjoy mobile systems that somehow we didn't  
3           enable our patent is the exact opposite of what Doctor Kia  
4           said under oath.

5           Let's go to slide 90.

6           Doctor Kia conceded he had never even built a mobile  
7           remote deposit capture system, and he could have built the  
8           system.

9           Let's go to slide 92.

10          The algorithms that are necessary to build the system are  
11          in the patent. You can look at the figures. And Mr. Prasad  
12          testified under oath that they were present.

13          Let's go to slide 51.

14          Not only did we build the system, the algorithms to  
15          deposit checks, we actually presented the design of  
16          smartphones and integrated devices, and Mr. Prasad testified  
17          that these are the exact devices that are used in USAA's  
18          system today. And you can see this in figure 3.

19          Let's go to slide 99.

20          This is a document that Defendants showed you. It's  
21          called a BIR brief. It's a business document. And Mr. Prasad  
22          testified under oath what the state of the system was at the  
23          time this business document was presented. That's talking  
24          about viability, the system worked with digital cameras.

25          THE COURT: Seven minutes remaining.

1 MR. SHEASBY: Let's go to slide 108.

2 These are the three patents that PNC chose to infringe  
3 and is trying to confuse the jury about because it relates to  
4 an infringement of a product that is not in this case, and  
5 there was a representation that Professor Conte, who showed  
6 you over a hundred slides and spoke for an hour and a half,  
7 didn't conclude that these three patents cover PNC's new  
8 4.20.1 system.

9 This is his testimony under oath: "Now, this alternative  
10 does not avoid infringement. USAA owns other patents in the  
11 2006 family, the '598, the '638, and the '136. And they do  
12 not require any of the auto-capture, retake photo screens, or  
13 keypad entries that PNC claims it removed from the system."

14 It may have gone quickly, and there's a reason for it.  
15 Their paid expert conceded it as well. They broke into one  
16 car in 2006 and they broke into our other car in 2021. In  
17 either instance, the consequences are the same.

18 Let's go to slide 110.

19 The suggestion that we haven't shown you the claims of  
20 the patents that cover the 4.20.1 system is false. We showed  
21 them to Doctor Vellturo, who was saying how the 4.20.1 was a  
22 non-infringing alternative. They claim that because they  
23 removed auto-capture and presenting photos, they have no  
24 obligations to us anymore, our technology is worthless. But  
25 our other patent claims don't require those features because

1 what the patents show is that we invented auto-capture. We  
2 invented mobile remote deposit capture.

3 Let's go to slide 121.

4 I want to talk to you about damages. The words of the  
5 claim define our invention. The claim is not on a single  
6 feature or showing a picture; the claim is the entire  
7 language. Doctor Vellturo's argument that he can pick out  
8 individual features and suggest that's the value of the claim  
9 absolutely contradicts the express instructions that Judge  
10 Gilstrap gave you.

11 Let's go to slide 138. 138.

12 Once again, Mr. Wilkinson explained to you that beginning  
13 in 2006 [sic] as our patents issued, we marked with them.  
14 They are calling Mr. Wilkinson a liar.

15 Let's go to slide 115.

16 Damages are for the use made of the invention by the  
17 infringer. That's the measure of damages. We know the  
18 measure of damages. 900,000 per month infringing accounts,  
19 105 million infringing deposits, \$55 billion in infringement.  
20 We know how much they save, at least \$3.88 per act of  
21 infringement. How much are we seeking? \$3.04. Every time  
22 they break the law, we get -- they get to keep 60 -- more than  
23 60 cents, more than 70 cents, and that has added up to close  
24 to \$30 million that they get to keep. Ms. Smith asked about  
25 what their reward is for breaking the law? The reward is



1 keeping \$30 million for their improper conduct.

2 118.

3 Mr. Kennedy analyzed and concluded that there were \$604  
4 million in profits that were generated from the use of the  
5 infringing system. \$604 million. And we're seeking 304  
6 million of that.

7 I want to talk a bit about the agreements. There was  
8 some significant omissions of information on this slide that  
9 was shown to you by counsel. First, the PNC/NCR agreement.  
10 It's not an agreement for patent rights. And Doctor Vellturo  
11 testified under oath that he wouldn't know how much they would  
12 have to pay if PNC actually had patent rights, which they  
13 don't because we have them.

14 This suggestion that auto-capture was not important,  
15 their own witness testified under oath that auto-capture was  
16 essential for their product.

17 The Wells Fargo agreement, I will not restate the number  
18 in a public forum, but we know the significant amount of money  
19 Wells Fargo paid USAA. They paid that money after two patent  
20 families were presented to Wells Fargo. Those are the exact  
21 same two patent families that are at issue in this case.

22 The Bremer and Assurant licenses, they were not for 3  
23 cents. You see the numbers of what they were for on a  
24 per-transaction basis. These were voluntary agreements.  
25 People who did not act illegally, people who did not break the

1 law. And they have nothing to do with PNC, which is a  
2 dramatically larger bank with dramatically different  
3 design -- dramatically different benefits.

4 THE COURT: One minute remaining.

5 MR. SHEASBY: Let's go to slide 148. Actually,  
6 let's go to slide 143.

7 PNC says they don't use, they are shocked that they are  
8 being accused of infringement. They use a system that they  
9 knew was infringing.

10 Let's take down the slides.

11 If you go to the verdict form, you will be asked if there  
12 are any claims that are infringed. If you conclude there are,  
13 there is liability.

14 Ladies and gentlemen of the jury, our board is generals  
15 and admirals who have made the decision that we are not going  
16 to allow a company like PNC to take our members' technology  
17 and money. It is the founders' intent that this be in your  
18 hands.

19 Ladies and gentlemen of the jury, this is in your hands.  
20 Thank you.

21 THE COURT: All right, ladies and gentlemen. I'd  
22 like to provide you with a few final instructions before you  
23 begin your deliberations.

24 You must perform your duty as jurors without bias or  
25 prejudice as to any party. The law does not permit you to be

1 controlled by sympathy, prejudice, or public opinion. All  
2 parties expect that you will carefully and impartially  
3 consider all the evidence and follow the law as I have given  
4 it to you and reach a just verdict regardless of the  
5 consequences.

6 Answer each question in the verdict based on the facts as  
7 you find them to be. Follow the instructions that the Court  
8 has given you on the law. Again, do not decide who you think  
9 should win this case and answer the questions to reach that  
10 result. Let me remind you once more, your answers to the  
11 questions in the verdict form must be unanimous.

12 You should consider and decide this case as a dispute  
13 between persons of equal standing in the community, equal  
14 worth, and holding the same or similar stations in life. This  
15 is true in patent cases between corporations, partnerships, or  
16 individuals.

17 A patent owner is entitled to protect his rights under  
18 the laws of the United States, and this includes bringing a  
19 suit in a U.S. district court for money damages for  
20 infringement. The law recognizes no distinction among types  
21 of parties, and all corporations, partnerships, and other  
22 organizations stand equal before the law, regardless of their  
23 size and regardless of who owns them, and they are to be  
24 treated as equals.

25 Now, when you retire to the jury room to deliberate on

1 your verdict, as I've told you, you will each have a printed  
2 copy of these final jury instructions that I'm giving you.

3 If during your deliberations you desire to review any of  
4 the exhibits which the Court has admitted into evidence over  
5 the course of the trial, you should advise me by a written  
6 note delivered to the Court Security Officer, signed by your  
7 foreperson, and I will then send that exhibit or those  
8 exhibits to you.

9 Once you retire, you should first select your foreperson  
10 and then conduct your deliberations. And if you recess at any  
11 time during your deliberations, follow all the instructions  
12 that I've given you about your conduct during the trial.

13 After you have reached a verdict, your foreperson should  
14 answer the questions in the verdict form reflecting your  
15 unanimous answers, date the verdict form, sign it as the  
16 foreperson of the jury, and then notify the Court Security  
17 Officer. Do not reveal your answers until such time as you  
18 are discharged by me, and you must never disclose to anyone,  
19 not even to me, your numerical division on any unanswered  
20 question.

21 Any notes that you've taken over the course of the trial  
22 are aids to your memory only. If your memory differs from  
23 your notes, rely on your memory and not your notes. The notes  
24 are not evidence. And a juror who has not taken notes should  
25 rely on his or her own independent recollection of the

1 evidence and not be unduly influenced by the notes of other  
2 jurors. Notes are not entitled to any greater weight than the  
3 recollection or impression of each juror about the evidence.

4 If you want to communicate with me at any time during  
5 your deliberations, you should give a message or question,  
6 written and signed by your foreperson, to the Court Security  
7 Officer who will bring it to me, and I will then respond as  
8 promptly as possible, either in writing or by having you  
9 brought back into the courtroom where I can address you  
10 orally. And I will always first disclose to the attorneys in  
11 the case your question and my response before I answer any  
12 question.

13 After you have reached a verdict and the Court has  
14 accepted that verdict and discharged you as jurors, at that  
15 time you will be free to discuss your service in this case  
16 with anyone that you choose to. By the same token, ladies and  
17 gentlemen, at that time you'll be just as free not to discuss  
18 your service in this case as you choose to. At that point in  
19 time that decision will be yours and yours alone.

20 I'm now going to hand eight printed copies of these final  
21 jury instructions and one clean copy of the verdict form to  
22 the Court Security Officer, who will deliver these to you in  
23 the jury room.

24 Ladies and gentlemen of the jury, you may now retire to  
25 the jury room to deliberate on your verdict.

1 (Whereupon, the jury left the courtroom.)

2 THE COURT: Counsel, awaiting either a question from  
3 the jury or a return of their verdict, we stand in recess.

4 MR. SHEASBY: Thank you, Your Honor.

5 (Jury deliberates.)

6 THE COURT: Be seated, please.

7 Counsel, I've received the following note from the jury.  
8 I'll read it and then I have a Xerox copy for each of the  
9 parties. After I've read it, you can approach and get a copy.

10 The note is dated today, and reads as follows: "We would  
11 like to see these exhibits: PX 0157, PDX 1.29, PX 0150,  
12 PX 0097, PX 0109, DDX 7.19." And it's signed by Ms. O'Dell,  
13 who is Juror No. 3, I believe, so I assume she is our  
14 foreperson.

15 I am going to mark this note with a '1' in the upper  
16 right-hand corner to identify it as the first note from the  
17 jury. I'm going to hand the original note to the Courtroom  
18 Deputy, and I'm going to hand the Courtroom Deputy two copies  
19 two Xerox copies of the note. Somebody from either side can  
20 come forward and get a copy for each side to look at.

21 While I was waiting on everybody to assemble, I've  
22 composed a preliminary written response. I'm going read it to  
23 you and then I'll be glad to take any comments.

24 "Members of the jury, in response to your request, I'm  
25 sending you the following exhibits: PX 0157 PX 0150, PX 0097,

1 PX 0109. You also asked for PDX 1.29 and DDX 7.19. These are  
2 demonstratives and are not evidence and I cannot send these to  
3 you. You'll have to rely on your memories of the testimony  
4 that was given while these were used with witnesses." Dated  
5 and signed by me.

6 And I'm assuming from the identification in their note  
7 that those are, in fact, demonstratives.

8 I'm going to go off the record for a minute. I suggest  
9 that while we're off the record, that a representative of each  
10 side meet with the Courtroom Deputy and let's make sure that  
11 there's no doubt about which numbered exhibits these are and  
12 that we have the right ones, and then I'll take any comments  
13 on the record from the parties before I send the exhibits into  
14 the jury.

15 Let's go off the record.

16 (Pause in proceedings.)

17 THE COURT: All right. Let's go back on the record.

18 Representatives of the two parties have worked with the  
19 Courtroom Deputy to identify the requested exhibits while we  
20 were off the record.

21 Are there any objections from either party to the Court  
22 sending those four exhibits to the jury with the note that I  
23 read to you?

24 MR. BUNT: Not from the Plaintiff, Your Honor.

25 MS. SMITH: Not from the Defendant, Your Honor.

1 THE COURT: All right. Would you hand me those  
2 actual exhibits, Ms. Brunson? And I'll put this signed note  
3 with it in response, and I'll hand them to Mr. Latham, the  
4 Courtroom Deputy, and ask him -- the Court Security Officer, I  
5 should say, and ask him to deliver them to the jury.

6 All right, counsel. Awaiting either another note or the  
7 return of a verdict, we stand in recess.

8 (Deliberations continue.)

9 THE COURT: Please be seated.

10 We received a second note from the jury. I'll read the  
11 note into the record and, as before, I have a copy for each  
12 side to pick up from the Courtroom Deputy, a Xerox copy, after  
13 I've read it into the record.

14 "We would like to view the following exhibits: DDX 9.15  
15 DDX 9.21 DDX 15.20, PTX 0150, PX 1377, PX 0107, PX 0136,  
16 PX 0196, PX 0926, PX 1154, PX 0097, PX 1711, PX 1762, PX  
17 0195." And this is also signed by Ms. O'Dell, Juror No. 3, as  
18 the foreperson.

19 I'll hand the Courtroom Deputy a copy for each side, if  
20 you want to come forward and receive it, and I'll mark the  
21 original note in the upper right-hand corner for  
22 identification as '2', and I'll deliver the original note to  
23 the Courtroom Deputy.

24 This looks like basically the same exercise we just went  
25 through, even though there is a longer list of exhibits here.



1 I've prepared the following response in light of this  
2 second note. I'll read it to you and then I'll take your  
3 comments.

4 "Members of the jury, in response to your question, I'm  
5 sending you the following exhibits: PX 1377, PX 0107,  
6 PX 0136, PX 0196, PX 0926, PX 1154, PX 0097, PX 1711, PX 1762,  
7 PX 0195. You also asked for DDX 9.15, DDX 9.21, and  
8 DDX 15.20. These are demonstratives and are not evidence and  
9 I cannot send these to you. You will have to rely on your  
10 memories of the testimony that was giving while these were  
11 used with witnesses. Also I have previously sent you PX 0150,  
12 so it is already in your possession."

13 That is the Court's intended responsive note. I'll note  
14 that this PX 0150 was in the first note. It's already been  
15 sent back to them.

16 Other than making sure we get the right exhibits out of  
17 the box of exhibits and that they're sent back, does anybody  
18 have either an objection a question or a problem with pulling  
19 these exhibits and sending them back?

20 MR. BUNT: No objection from Plaintiff, Your Honor.

21 MS. SMITH: None from Defendant, Your Honor.

22 THE COURT: Already. Why don't Ms. Smith and  
23 Mr. Bunt, why don't you come forward and with the Courtroom  
24 Deputy make sure we get the right exhibits. And once you've  
25 physically got them pulled, I'll take them and put this

1 written response with them and deliver them to the Court  
2 Security Officer with directions that they be delivered to  
3 the jury.

4 (Pause in proceedings.)

5 THE COURT: Let's go back on the record.

6 The Court's proposed response to note No. 2 is as  
7 follows: "Members of the jury, in response to your request,  
8 I'm sending you the following exhibits: PX 1377, PX 0107,  
9 PX 0136, PX 0196, PX 0926, PX 1154, PX 1762, PX 0195. You  
10 also asked for DDX 9.15, DDX 9.21 and DDX 15.20. These are  
11 demonstratives and are not evidence and I cannot send these to  
12 you. You will have to rely on your memories of the testimony  
13 that was given while these were used with witnesses. Also I  
14 have previously sent you PX 0150 and PX 0097, so these  
15 exhibits are already in your possession. Additionally,  
16 PX 1711 was never used as an exhibit during the trial and is  
17 not something I can send to you."

18 Anybody have a problem or an objection to that response?

19 MR. BUNT: No objection from USAA.

20 MS. SMITH: None from Defendant, Your Honor.

21 THE COURT: All right. Then I'll execute and sign  
22 the written response, I'll put it with these identified  
23 exhibits that have been pulled, and I'll hand these to the  
24 Court Security Officer with directions to deliver the same to  
25 the jury.

1 All right. Pending either another note or the return of  
2 a verdict, we'll stand in recess.

3 (Deliberations continue.)

4 THE COURT: Be seated, please.

5 Counsel, I've received the following note from the jury:  
6 "We have reached a verdict." And it's signed by Ms. Lisa  
7 O'Dell, Juror No. 3, who appears to be our foreperson. It is  
8 dated with today's date. And I will hand it marked for  
9 identification with a '3' to the Courtroom Deputy.

10 Let's bring in the jury, please.

11 (Whereupon, the jury entered the courtroom.)

12 THE COURT: Please be seated, ladies and gentlemen.

13 Ms. O'Dell, I understand that you're the foreperson of  
14 the jury. Is that correct?

15 THE PRESIDING OFFICER: Yes, sir.

16 THE COURT: Has the jury reached a verdict?

17 THE PRESIDING OFFICER: Yes, sir.

18 THE COURT: Would you hand the completed verdict  
19 form to the Court Security Officer who will bring it to me?

20 Ladies and gentlemen of the jury, I'm going to announce  
21 the verdict into the record. I want you the listen very  
22 carefully as I do that, because after I've announced the  
23 verdict, I'm going to poll the members of the jury to make  
24 sure that this is, in fact, the unanimous verdict of all eight  
25 members of the jury.

1 Turning to the verdict form and beginning on page 4 where  
2 question 1 is situated, "Did USAA, the Plaintiff, prove by a  
3 preponderance of the evidence that PNC, the Defendant,  
4 infringed any of the asserted claims?" the jury's answer is  
5 "Yes."

6 Turning to page 5 where question 2 is situated, "Did PNC,  
7 the Defendant, prove by clear and convincing evidence that any  
8 of the following asserted claims are invalid?" with regard to  
9 each of the claims itemized as a part of question 2 on page 5,  
10 the jury in every instance answered "No."

11 Turning to question 3 on page 6 of the verdict form, "Did  
12 USAA, the Plaintiff, prove by a preponderance of the evidence  
13 that PNC, the Defendant, willfully infringed any of the  
14 asserted claims that you found were infringed?" the jury's  
15 answer is "Yes."

16 Turning next to page 7 of the verdict form where question  
17 4 is situated, "What sum of money if paid now in cash has  
18 USAA, the Plaintiff, proven by a preponderance of the evidence  
19 would compensate it for its damages for infringement?" the  
20 jury's answer is "\$218,450,000."

21 Turning to page 8, the final page of the verdict form, I  
22 find it is dated with today's date, May the 13th, 2022, and it  
23 is signed by Ms. Lisa O'Dell as foreperson of the jury.

24 Ladies and gentlemen of the jury, let me poll you to  
25 ensure this is the unanimous verdict of all eight members of

1 the jury. If this is your verdict as I have read it, would  
2 you please stand up? Thank you. Please be seated.

3 Let the record reflect that all eight members of the jury  
4 immediately rose and stood in response to the Court's question  
5 to poll the jury.

6 Having polled the jury, the Court finds that this is the  
7 unanimous verdict of all eight members of the jury. The Court  
8 accepts the jury's verdict. The Court delivers the original  
9 verdict form as executed to the Courtroom Deputy.

10 Ladies and gentlemen, this now completes the trial of  
11 this case. From the very beginning I have instructed you time  
12 and time again about not communicating or discussing this case  
13 with anyone in any way. I am releasing you from that  
14 instruction. I'm releasing you from all the instructions and  
15 requirements that have been placed on you while you have  
16 served as jurors in this case, and I am discharging you from  
17 your position as jurors in this case. That means, ladies and  
18 gentlemen, you're free to talk about this in any way with  
19 anybody that you want to. It also means you're completely  
20 free not to talk about it with anybody in any way. That  
21 decision is 100 percent yours and yours alone.

22 Also, ladies and gentlemen, you may find this  
23 interesting. This is my 100th jury trial since I've been on  
24 the bench, and as I have with every jury trial where I've  
25 received and accepted the jury's verdict, I ask the jury for a

1 favor and I'm going to ask you for a favor, and that is,  
2 before you leave, I'd like you to go back to the jury room and  
3 now that you have been discharged, I'd like to come into the  
4 jury room and I'd like to shake each hand, I'd like to look  
5 each person in the eye, and I'd like to tell you thank you for  
6 the service that you've rendered, the sacrifice that you've  
7 borne, and the public service that you have tendered as a part  
8 of this jury. I think what you've done warrants that, I think  
9 it's that important, and if you would give me that honor, I  
10 promise I won't keep you--it's Friday afternoon and  
11 everybody's ready to go--but if you would give me that honor,  
12 I'd like to thank you personally, each one individually,  
13 before you leave because I think the service that you've  
14 rendered to our country by being jurors in this case is that  
15 significant and it warrants that kind of special attention.

16 That completes the trial of this case, ladies and  
17 gentlemen. If you'll do me that favor, I'll see you in the  
18 jury room.

19 Counsel, you are excused.

20 (The proceedings were concluded at 4:48 p.m.)  
21  
22  
23  
24  
25

1 I HEREBY CERTIFY THAT THE FOREGOING IS A  
2 CORRECT TRANSCRIPT FROM THE RECORD OF  
3 PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.  
4 I FURTHER CERTIFY THAT THE TRANSCRIPT FEES  
5 FORMAT COMPLY WITH THOSE PRESCRIBED BY THE  
6 COURT AND THE JUDICIAL CONFERENCE OF THE  
7 UNITED STATES.

8  
9 S/Shawn McRoberts 05/13/2022

10 \_\_\_\_\_DATE\_\_\_\_\_  
11 SHAWN McROBERTS, RMR, CRR  
12 FEDERAL OFFICIAL COURT REPORTER  
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Shawn M. McRoberts, RMR, CRR  
Federal Official Court Reporter